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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

OCTOBER TERM, 1986

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423 SOUTH SALINA STREET, INC.,

Appellant,

vs.

CITY OF SYRACUSE, METROPOLITAN DEVELOPMENT FOUNDATION OF CENTRAL NEW YORK, INC., AND AMLEA (NEW YORK), INC.,

Appellees.

JURISDICTIONAL STATEMENT

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(13264)

QUESTION PRESENTED

Whether a plaintiff asserting federal constitutional rights pursuant to the Civil Rights Act, 42 U.S.C. §1983, may validly be required by state law to serve a notice of claim within ninety days of the event giving rise to liability as a condition precedent to the maintenance of the action?

PARTIES TO THE PROCEEDING

The parties to the proceeding are 423 South Salina Street, Inc. and City of Syracuse.

Pursuant to Rule 10.4 of the United States Supreme Court, Appellant hereby asserts its belief that Metropolitan Development Foundation of Central New York, Inc. and Amlea (New York) Inc., who were Defendants below, have no interest in the outcome of this Appeal.

423 South Salina Street, Inc. has no subsidiaries or corporate affiliate.

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423 SOUTH SALINA STREET, INC., APPELLANT

V.

**CITY OF SYRACUSE
METROPOLITAN DEVELOPMENT FOUNDATION
OF CENTRAL NEW YORK, INC.
AND AMLEA (NEW YORK), INC., APPELLEES**

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

423 South Salina Street, Inc., Appellant, appeals from the final judgment of the Court of Appeals of the State of New York, holding that sections 50-e and 50-i of the N.Y. General Municipal Law, as applied in this case, are not invalid as repugnant to 42 U.S.C. §1983, 42 U.S.C. §1988 and Article VI, cl. 2, the Supremacy Clause of the United States Constitution.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of New York, which appears in the Appendix, Page A-1, *infra,* is reported at 68 NY2d 474, ____N.E.2d____ (1986).

The opinion of the Appellate Division of the Supreme Court of the State of New York, which appears in the Appendix, Page A-1 *infra,* is reported at 112 A.D.2d 745, 492 NYS2d 241 (Fourth Department 1985).

The unpublished opinion of the Supreme Court of the State of New York, Onondaga County, appears in the Appendix, Page A-21, *infra.*

The opinion of the United States District Court for the Northern District of New York, which appears in the Appendix, Page A-30 *infra,* is reported at 566 F.Supp 484 (N.D.N.Y. 1983).

The per curiam opinion of the United States Court of Appeals for the Second Circuit, which appears in the Appendix, Page A-49, infra, is reported at 724 F.2d 26 (CA2 1983).

JURISDICTION

The judgment of the Court of Appeals of the State of New York dismissing Appellant's Complaint was entered on November 20, 1986. A Notice of Appeal to this Court was timely filed in the Court of Appeals of the State of New York on January 16, 1987.

This Appeal is being docketed in this Court within 90 days of the entry of judgment below. The jurisdiction of this Court is invoked under 28 USC §1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

UNITED STATES CONSTITUTION

Article VI, clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

FEDERAL STATUTES

United States Code, title 42, § 1983 — Civil Action for Deprivation of Rights [The Civil Rights Act]

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . .

United States Code, title 42, § 1988 — Proceedings in Vindication of Civil Rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS,". . . for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and the laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause,. . . .

NEW YORK STATUTES

N. Y. General Municipal Law, Section 50-e Notice of Claim

1. When service required; time for service; upon whom service required.

(a) In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general construction law, or any officer, ap-

pointee or employee thereof, the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises; except that in wrongful death actions, the ninety days shall run from the appointment of a representative of the decedent's estate.

(b) Service of the notice of claim upon an officer, appointee or employee of a public corporation shall not be a condition precedent to the commencement of an action or special proceeding against such person. If an action or special proceeding is commenced against such person, but not against the public corporation, service of the notice of claim upon the public corporation shall be required only if the corporation has a statutory obligation to indemnify such person under this chapter or any other provision of law.

2. Form of notice; contents. The notice shall be in writing, sworn to by or on behalf of the claimant, and shall set forth: (1) the name and post-office address of each claimant, and of his attorney, if any; (2) the nature of the claim; (3) the time when, the place where and the manner in which the claim arose; and (4) the items of damage or injuries claimed to have been sustained so far as then practicable but a notice with respect to a claim against a municipal corporation other than a city with a population of one million or more persons shall not state the amount of damages to which the claimant deems himself entitled, provided, however, that the municipal corporation, other than a city with a population of one million or more persons, may at any time request a supplemental claim setting forth the total damages to which the claimant deems himself entitled. A supplemental claim shall be provided by the claimant within fifteen days of the request. In the event the supplemental demand is not served within fifteen days, the court, on motion, may order that it be provided by the claimant.

3. How served; when service by mail complete; defect in manner of service; return of notice improperly served.

(a) The notice shall be served on the public corporation against which the claim is made by delivering a copy thereof personally, or by registered or certified mail, to the person designated by law as one to whom a summons in an action in the supreme court issued against such corporation may be delivered, or to an attorney regularly engaged in representing such public corporation.

(b) Service by registered or certified mail shall be complete upon deposit of the notice of claim, enclosed in a postpaid properly addressed wrapper, in a post office or official depository under the exclusive care and custody of the United States post office department within the state.

(c) If the notice is served within the period specified by this section, but in a manner not in compliance with the provisions of this subdivision, the service shall be valid if the public corporation against which the claim is made demands that the claimant or any other person interested in the claim be examined in regard to it, or if the notice is actually received by a proper person within the time specified by this section, and the public corporation fail to return the notice, specifying the defect in the manner of service, within thirty days after the notice is received.

(d) If the notice is served within the period specified by this section and is returned for the reason and within the time provided in this subdivision, the claimant may serve a new notice in a manner complying with the provisions of this subdivision within ten days after the returned notice is received. If a new notice is so served within that period, it shall be deemed timely served.

4. Requirements of section exclusive except as to conditions precedent to liability for certain defects or snow or ice. No other or further notice, no other or further service, filing or delivery of the notice of claim, and no notice of intention to commence an action or special proceeding, shall be required as a condition to the commencement of an action or special proceeding for the enforcement of the claim; provided, however, that nothing herein

contained shall be deemed to dispense with the requirement of notice of the defective, unsafe, dangerous or obstructed condition of any street, highway, bridge, culvert, sidewalk or crosswalk, or of the existence of snow or ice thereon, where such notice now is, or hereafter may be, required by law, as a condition precedent to liability for damages or injuries to person or property alleged to have been caused by such condition, and the failure or negligence to repair or remove the same after the receipt of such notice.

5. Application for leave to serve a late notice.

Upon application, the court, in its discretion, may extend the time to serve a notice of claim specified in paragraph (a) of subdivision one. The extension shall not exceed the time limited for the commencement of an action by the claimant against the public corporation. In determining whether to grant the extension, the court shall consider, in particular, whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including: whether the claimant was an infant, or mentally or physically incapacitated, or died before the time limited for service of the notice of claim; whether the claimant failed to serve a timely notice of claim by reason of his justifiable reliance upon settlement representations made by an authorized representative of the public corporation or its insurance carrier; whether the claimant in serving a notice of claim made an excusable error concerning the identity of the public corporation against which the claim should be asserted; and whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits.

An application for leave to serve a late notice shall not be denied on the ground that it was made after commencement of an action against the public corporation.

6. Mistake, omission, irregularity or defect. At any time after the service of a notice of claim and at any stage of an action or special proceeding to which the provisions of this section are applicable, a mistake, omission, irregularity or defect made in good faith in the notice of claim required to be served by this section, not pertaining to the manner or time of service thereof, may be corrected, supplied or disregarded, as the case may be, in the discretion of the court, provided it shall appear that the other party was not prejudiced thereby.

7. Applications under this section. All applications under this section shall be made to the supreme court or to the county court: (a) in a county where the action may properly be brought for trial, (b) if an action to enforce the claim has been commenced, in the county where the action is pending, or (c) in the event that there is no motion term available in any of the counties specified in clause (a) or (b) hereof, in any adjoining county. Where the application is for leave to serve a late notice of claim, it shall be accompanied by a copy of the proposed notice of claim.

8. Inapplicability of section. This section shall not apply to claims arising under the provisions of the workmen's compensation law, or the volunteer firemen's benefit law, or to claims against public corporations by their own infant wards.

N. Y. General Municipal Law, Section 50-i
Presentation of Tort Claims: Commencement of Actions

1. No action or special proceeding shall be prosecuted or maintained against a city, county, town, village, fire district or school district for personal injury, wrongful death or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of such city, county, town, village, fire district or school district or of any officer, agent or employee thereof, including volunteer firemen of any such city, county, town, village, fire district or school district or any volunteer fireman whose services have been accepted pursuant to the

provisions of section two hundred nine-i of this chapter, unless, (a) a notice of claim shall have been made and served upon the city, county, town, village, fire district or school district in compliance with section fifty-e of this chapter, (b) it shall appear by and as an allegation in the complaint or moving papers that at least thirty days have elapsed since the service of such notice and that adjustment or payment thereof has been neglected or refused, and (c) the action or special proceeding shall be commenced within one year and ninety days after the happening of the event upon which the claim is based; except that wrongful death actions shall be commenced within two years after the happening of the death.

2. This section shall be applicable notwithstanding any inconsistent provisions of law, general, special or local, or any limitation contained in the provisions of any city charter.

3. Nothing contained herein or in section fifty-h of this chapter shall operate to extend the period limited by subdivision one of this section for the commencement of an action or special proceeding.

Syracuse City Charter, Section 8-115 — Civil Actions Against the City

The City shall not be liable in a civil action for damages or injuries to person or property or invasion of personal or property rights of any name or nature whatsoever, whether casual or continuing, arising at law or in equity, alleged to have been caused or sustained, in whole or in part, by or because of any omission of duty, wrongful act, fault, neglect, misfeasance or negligence on the part of the City, or any of its agents, officers or employees unless a notice of claim shall have been made and served in compliance with section 50-e of the General Municipal Law, nor unless an action shall be commenced thereon within one year and ninety days after the happening of such accident or injury or the occurrence of such act, omission, fault or neglect; but no action

shall be commenced to recover upon or enforce any such claim against the City until the expiration of thirty days after the service of said notice. Nothing herein contained, however, shall be held to revive any claim or cause of action now barred by any existing requirement or statute of limitations nor to waive any existing limitation now applicable to any claim or cause of action against the City.

STATEMENT OF THE CASE AND HOW THE FEDERAL QUESTION WAS RAISED

Appellant 423 South Salina Street, Inc., which owned real property ("Property") in downtown Syracuse, commenced this action to recover damages resulting from the defendant City's gross misuse of its taxing power. Appellant alleged that the City, pursuant to a municipal policy of continually overtaxing downtown properties, repeatedly placed illegal assessments on the Property, so burdensome as to completely destroy the value of the Property. After so doing, the City took a tax deed to the Property in consequence of Appellant's inability to pay the illegal taxes and thereby achieved its objective of acquiring the Property without condemnation and without just compensation. Relying on 42 U.S.C. §1983, Appellant asserted violations, *inter alia,* of the due process clause and for a taking without just compensation under the Fourteenth Amendment.

An earlier action seeking the same relief which had been brought by Appellant in a federal court was dismissed on the grounds of comity and the Tax Injunction Act, 566 F.Supp. 484 (N.D.N.Y. 1983). The Court of Appeals for the Second Circuit affirmed the dismissal but noted: "According to the New York courts, the City of Syracuse has engaged in 'an aggravated pattern of misuse of the taxing power' by overassessing property year after year despite court rulings that such overassessments were unlawful." 724 F.2d 26 (CA2 1983). The Second Circuit ex-

pressed confidence that the New York courts provided adequate state law remedies for the problem. *Id.* at 27.

Appellant then commenced the present, essentially identical, action in the Supreme Court of the State of New York, Onondaga County. Defendants moved to dismiss on the grounds that Appellant lacked standing, that the complaint failed to state a cause of action, that the action was barred by a one year and 90 day statute of limitations and by Appellant's failure to file a "notice of claim" within ninety days of the time the claim arose, as required by New York General Municipal Law sections 50-e and 50-i (McKinney 1986). Over Appellant's objections that the notice of claim requirement could not be validly applied to an action arising under 42 U.S.C. §1983, the complaint was dismissed on this and other grounds in an unreported opinion, see Appendix at A-22.

On appeal to the Supreme Court, Appellate Division, Fourth Department, Appellant urged that the dismissal, insofar as based on the failure to file a notice of claim, was repugnant to federal law. The Appellate Division affirmed on other grounds without reaching the notice of claim issue, 112 A.D.2d 745, 492 N.Y.S.2d 241 (4th Dept. 1985), See Appendix at A-21.

On appeal, the New York Court of Appeals agreed with Appellant that the action stated a cause of action, that Appellant had standing and that the action was timely under New York's statute of limitations. However, discounting Appellant's objections sounding in federal law, the Court held that the claim was barred by Appellant's failure to serve a "notice of claim" within ninety days of the accrual of the claim or to obtain judicial discretionary relief from that time limit. See Appendix at A-1. The Court of Appeals reasoned that:

> The applicability to a section 1983 action of a state notice of claim provision, involving as it does construction of 42 U.S.C. section 1988, is a matter of federal law, but when, as here, there is neither a decision of the Supreme Court nor

> uniformity in the decisions of the lower federal courts, a state court required to interpret a federal statute is not bound to follow the decision of the federal courts or precluded from exercising its own judgment. . . (citation omitted). See Appendix at A-13.
>
> * * *
>
> In light of the foregoing analysis and bearing in mind that the Supreme Court has yet to consider the question, we conclude that General Municipal Law section 50-i is applicable to this action. See Appendix at A-19.

The Court also refused to apply its judicially crafted "public interest" exception to the notice of claim requirement because that exception applies only to actions seeking class relief (Appendix, p. A-19).

THE QUESTIONS ARE SUBSTANTIAL

I. The Many Conflicting Decisions On The Point At Issue Call For Resolution By This Court

A substantial majority of the courts which have addressed the issue have held that state and local notice of claim requirements may not be applied to frustrate actions brought under 42 U.S.C. §1983. Among these are the Court of Appeals for the Second Circuit. *Brandon v. Board of Education,* 635 F.2d 971, 973-974, n. 2 (CA2 1980), cert. denied, 454 U.S. 1123, 102 S.Ct. 970 (1981); *Williams v. Allen,* 616 F.Supp. 653, 656-659 (E.D.N.Y. 1985); *but see Cardo v. Lakeland School District,* 592 F.Supp. 765, 772-773 (S.D.N.Y. 1984) (contra). Thus, a New Yorker with a federal civil rights claim either will or will not have to serve a timely notice of claim, depending on whether the action is brought in state or federal court. (It would seem that New York litigants are encouraged to add to the already burdened federal district court dockets.)

Other courts holding that section 1983 actions may not be subjected to notice of claim rules include the Court of Appeals for the District of Columbia Circuit, which thoroughly discussed the role of 42 U.S.C. §1988 and rejected the application of a District of Columbia rule on the ground that there was no gap in federal law which allowed the application of the local notice of claim requirement, see *Brown v. United States,* 742 F.2d 1498, 1503-1510 (CADC 1984) (en banc), cert. denied, 471 U.S. 1073, 105 S.Ct. 2153 (1985) (Chief Justice Burger and Justice White dissenting from the denial of certiorari).

See also, to the same effect, *Willis v. Reddin,* 418 F.2d 702, 704-705 (9th Cir. 1969); *Rosa v. Cantrell,* 705 F.2d 1208, 1221 (10th Cir. 1982), cert. denied, 464 U.S. 821, 104 S.Ct. 85 (1983); *Williams v. Posey,* 475 F.Supp. 133 (M.D. Ga. 1979); *Perrote v. Percy,* 452 F.Supp. 604 (E.D. Wis. 1972); *Luker v. Nelson,* 341 F.Supp. 111, 115-119 (N.D. Ill. 1972); *Williams v. Horvath,* 16 Cal.3d 834, 129 Cal. Reptr. 453, 548 P.2d 1125 (1976); *Overman v. Klein,* 103 Idaho 795, 799, 654 P.2d 888, 892 (1982); *Doe v. Ellis,* 103 Wis.2d 581, 309 N.W.2d 375 (1981); *Fuchilla v. Layman,* 210 N.J.Super. 574, 510 A.2d 281 (N.J.Super. A.D. 1936); *Spencer v. City of Seagoville,* 700 S.W.2d 953, 955 (Tex. Ct. App. 1985). Several state courts have found short notice of claim provisions to be so obnoxious that they have held them to be unconstitutional in all cases — not only those involving civil rights. *Miller v. Boone County Hospital,* ____Iowa.2d____, 394 N.W.2d 776 (1986); *O'Neil v. City of Parkersburg,* 160 W.Va. 694, 237 S.E.2d 504 (1977); *Hunter v. North Mason High School,* 85 Wash.2d 810, 539 P.2d 845 (1975); *Turner v. Staggs,* 89 Nev. 230, 510 P.2d 879, cert. denied, 414 U.S. 1079, 94 S.Ct. 598 (1973); *Reich v. State Highway Department,* 386 Mich. 617, 194 N.W.2d 700 (1972).

Contrariwise, section 1983 claims have been held subject to local notice of claim requirements in *Deary v. Three Un-Named Police Officers,* 746 F.2d 185, 193-198, 199 (Higginbotham, J.,

dissenting and concurring) (CA3 1984) and in *Indiana Department of Public Welfare v. Clark,* 478 N.E.2d 699, 701-702 (Ind. Ct. App. 1985), cert. denied, 106 S.Ct. 2893 (1986). See also *Mills v. County of Monroe,* 59 N.Y.2d 307, 464 N.Y.S.2d 709, 451 N.E.2d 456, cert. denied, 484 U.S. 1018, 104 S.Ct. 551 (1983), holding that plaintiff's failure to comply with another of New York's notice of claim rules barred her employment discrimination claim brought under 42 U.S.C. section 1981.

According to the Court below, it was the very lack of uniformity, coupled with an absence of a definitive ruling from this Court, that led it to exercise its "own judgment" and resolve the conflict in favor of state law. See Appendix at A-13, A-19.

II. The Holding Below Imposes Substantial Burdens On The Assertion of Federal Rights

The question of whether states and their subdivisions may lawfully require a notice of claim to be filed within a short time frame after the occurrence of a civil rights violation as a condition precedent to the maintenance of an action brought pursuant to 42 U.S.C. §1983 is important because such requirements are both common and burdensome.

"Statutes, ordinances, and municipal charters frequently require that a notice of tort claim be given a local governmental unit before a suit for damages may be brought." Annot., 59 A.L.R.3d 93, 97 Sec. 2[a] (1974). Such statutes are found in "most jurisdictions," Annot., 51 A.L.R.2d 1132 (1957). They typically require service of the notice of claim within a short time period, see examples collected in Annot., 59 A.L.R.3d 93, 101-126, including many using a ninety day period and some as short as sixty days. Moreover, such statutes often require substantial detail in the notice of claim, including the time, place and cause of the accident as well as a description of the injury, *Id.* at 101.

The New York requirements at issue here affect all actions against municipalities, school districts and like entities, for per-

sonal injury, wrongful death or property damage when the claim is based on the "negligence or wrongful act" of such an entity or its employees. New York General Municipal Law §50-i. Such actions may not be maintained unless the claimant first serves a notice of claim on the entity "in compliance with" with General Municipal Law §50-e and §50-i.

Section 50-e (1)(a) requires that the notice be served "within ninety days after the claim arises." The notice must be in writing, be sworn to, and include the following information: the name and address of each claimant "and of his attorney, if any"; "the nature of the claim"; "the time when, the place where and the manner in which the claim arose"; and (depending on the nature of the defendant) the items of damage sustained, *id.*, section 50-e(2).

New York courts often apply demanding standards to the form of notice — dismissals are common. See, e.g. *O'Brien v. City of Syracuse,* 54 N.Y.2d 353, 358, 445 N.Y.S.2d 687, 689, 429 N.E.2d 1158 (1981); *Jackson v. Police Department of New York,* 119 A.D.2d 551, 500 N.Y.S.2d 553 (2d Dept. 1986); *Caselli v. City of New York,* 105 A.D.2d 251, 483 N.Y.S.2d 401 (2d Dept. 1984); *Faubert v. New York,* 90 A.D.2d 509, 455 N.Y.S.2d 24 (2d Dept. 1982); *Phelps Steel, Inc. v. Glens Falls,* 89 A.D.2d 652, 453 N.Y.S.2d 118 (3d Dept. 1982). See also *Gold v. New York,* 80 A.D.2d 138, 437 N.Y.S.2d 973 (1st Dept. 1981) (action dismissed because notice served on City rather than on its board of education); *Krieger v. New York,* 118 Misc.2d 537, 461 N.Y.S.2d 171 (Sup. Ct. 1983) (action dismissed because notice served by first class mail rather than certified mail).

The ninety day time limit is not absolute. Section 50-e (5) allows a court "in its discretion" to extend it up to the time allowed by the otherwise applicable statute of limitations for commencing an action. In exercising its discretion, the court is to consider such factors as whether the defendant had notice of the facts constituting claim through some other means, whether the claimant

died, or was an infant, or was physically or mentally incapacitated and whether the defendant was prejudiced by the delay in the service of the claim. Despite the liberal sounding list of factors, motions to be excused from the consequences of lateness are often denied, particularly when the claimant is not an infant. "On an application for permission to file a late notice of claim against a government authority, it has been consistently held that the party seeking relief must give a satisfactory explanation for the delay." *Bullard v. City of New York,* 118 A.D.2d 447, 448, 499 N.Y.S.2d 880, 881 (lst Dept. 1986) (concurring opinion of Justice Kassal). Even a showing that the plaintiff is unable to speak or understand English does not excuse late service of the notice. See *Figueroa v. New York,* 92 A.D.2d 908, 460 N.Y.S.2d 199 (2d Dept. 1983) and *Tanco v. N. Y.C. Health and Hospitals Corp.,* 84 A.D.2d 501. 443 N.Y.S.2d 66 (1st Dept. 1981). For other appellate decisions refusing to permit late service see, e.g., *In re Martin,* 100 A.D.2d 879, 473 N.Y.S.2d 1021 (2d Dept. 1984); *Baehre v. County of Erie,* 94 A.D.2d 943, 464 N.Y.S.2d 69 (4th Dept. 1983), *Burns v. City of New York,* 21 A.D.2d 767 (1st Dept. 1964).

Moreover, notice of claim provisions exist in countless city charters which frequently become state law (by virtue of municipal home rule laws or by specific adoption by state statute as did the charter of the City of Syracuse.) Although the Court of Appeals did not "find it necessary to decide whether the [Syracuse] charter's broader coverage makes it inconsistent with §50-i. . ." (Appendix at A-14, fn.5), the "broader coverage" of a city charter could conceivably prescribe a 30 or 60 day period rather than a 90 day period, and, as is the case with respect to Syracuse's charter, need not confer discretion on a court to excuse a late filing.

The burden imposed on a civil rights grievant by the New York notice of claim rules and their short time limit is substantial. The detailed requirements of the notice of claim mean that as a practi-

cal matter the assistance of counsel is required. Counsel must fully investigate and carefully draft the document. It is difficult enough for the victim of an ordinary municipal tort to comply. Laymen are unlikely to know of the requirement and may fail to consult an attorney in time. These problems are compounded when constitutional rights are implicated, as the relevant law is often less clear and the facts not as readily available. As this Court has noted ". . .the section 1983 remedy encompasses a broad range of potential tort analogies, from injuries to property to infringements of individual liberty." *Wilson v. Garcia,* 471 U.S. 261, 277, 105 S.Ct. 1938, 1948 (1985). Knowledgeable counsel for civil rights matters is less easily found, especially outside the major municipalities.

III. Federal Law Does Not Permit Civil Rights Claims To Be So Burdened

The holding below violates the first principle of 42 U.S.C §1988, because that statute by its terms directs the courts to apply state laws only where federal laws are "not adapted to the object or are deficient in the provisions necessary to furnish suitable remedies. . ." Thus, statutes of limitation must be borrowed into federal law because they are "fundamental to a well-ordered judicial system." *Board of Regents v. Tomanio,* 446 U.S. 478, 487, 100 S.Ct. 1790, 1796 (1980). This cannot be said of notice of claim requirements, as these are almost never encountered except when the defendant is a governmental entity. The legal system functions quite well in their absence. Hence, there is neither a need nor a justification for borrowing a notice of claim rule into federal civil rights law. See discussion in *Brown v. United States,* 742 F.2d 1498, 1506 (CADC 1984) (en banc), cert. denied, 471 U.S. 1073, 105 S.Ct. 2153 (1985) (Chief Justice Burger and Justice White dissenting from denial of certiorari).

Even assuming, *arguendo,* that there is a notice of claim "gap" in section 1983 cases, section 1988 would not permit borrowing of a requirement which involves a 90-day cut-off period. To do so

would violate the second principle of 42 U.S.C. §1988 under which "courts are to apply state law only if it is not 'inconsistent with the Constitution and laws of the United States.' " *Burnett v. Grattan,* 468 U.S. 42, 48, 104 S.Ct 2924, 2929 (1984). In the present case, as in *Burnett v. Grattan, supra,* the application of a state rule which imposes a short time limit on a section 1983 claimant is inappropriate because it "fails to take into account the practicalities that are involved in litigating federal civil rights claims and policies that are analogous to the goals of the Civil Rights Acts." *Burnett v. Grattan,* 468 U.S. at 50, 104 S.Ct. at 2930.

In *Burnett,* the Court held it unrealistic to expect a civil rights plaintiff to commence an action within a six month statute of limitations. The burdens of a claimant who would satisfy New York General Municipal Law §§50-e and 50-i are also substantial (see *supra,* pp. 3-8). Yet under New York law, he must meet them in ninety (90) days or persuade a state judge to relieve him of the obligation.

The ruling below also burdens the civil rights claimant by undermining the uniformity principle of *Wilson v. Garcia,* 471 U.S. 261, 105 S.Ct. 1938 (1985). That case requires the application in each state of "the one most appropriate statute of limitations for all section 1983 claims." *Id.,* 471 U.S. at 275, 105 S.Ct. at 1947. While the New York notice of claim requirement is not a statute of limitations (indeed, it imposes an onerous additional requirement to the latter's admonition that an action be commenced within three years), it does impose a limitation of time on pain of dismissal. A claimant in New York (and in the many other states having such rules) must therefore consult at least two sources of law to determine the time in which he must take legal action when his civil rights claim lies against a public entity or its employees.

The "uniformity of time limit principle" of *Wilson v. Garcia* is further confused in New York by three additional factors traceable to the decision below. First, under the judicially crafted and

vaguely defined "public interest exception" to the New York rules, class action 1983 claimants need not serve a notice of claim, see Appendix at A-19. Second, the New York General Municipal Law is not the only statute requiring a notice of claim. Public entities not within its ambit may well be covered by a similar statute, or even an ordinance, see, e.g., N.Y. Education Law §3813 (1) (McKinney 1981); N.Y. Public Authorities Law §§1212, 1276 (McKinney 1982) *id.*, 1691 (McKinney 1981); N.Y. Public Housing Law §157 (McKinney Supp. 1987); Syracuse City Charter section 8-115. Third, a section 1983 claimant who commences his action in a federal district court in New York need not file a notice of claim (see discussion in Point I, *supra*).

If for any reason a civil rights claimant fails to meet the ninety day limit for serving the notice of claim, the plaintiff is subject to the discretionary justice of any of hundreds of state court judges — never the United States District Court — even where the federal court may be the intended forum. Further, the Court of Appeals has made it clear that it will not review the exercise of discretion by New York's four Appellate Divisions *Stowe v. City of Elmira,* 31 N.Y.2d 814, 339 N.Y.S.2d 463 (1972).

Thus, the Congressional "purpose to create an effective remedy for the enforcement of federal civil rights is obstructed by uncertainty. . .for scarce resources must be dissipated by useless litigation on collateral matters." *Wilson v. Garcia,* 471 U.S. at 275, 105 S.Ct. at 1947.

As in *Burnett v. Grattan, supra,* the goal of the New York notice of claim statutes — early notice to municipal officials of legal claims — is divergent from that of the Civil Rights Acts. Whatever the utility of such notice with respect to traditional tort claims, it cannot be permitted to frustrate the goals of section 1983, which are the "compensation of persons whose civil rights have been violated, and prevention of the abuse of state power." *Burnett v. Grattan,* 468 U.S. at 53, 104 S.Ct. at 2931 (citations omitted). See also *City of Riverside v. California,* 106 S.Ct. 2686,

2694 (1986); "[W]e reject the notion that a civil rights action for damages constitutes nothing more than a private tort suit benefiting only the individual plaintiffs whose rights were violated."

We quote from this Court's opinion in *Burnett v. Grattan, supra,* which, in turn, quoted from the opinion of the Court of Appeals for the Second Circuit in *Pauk v. Board of Trustees,* 654 F.2d 856, 862 (CA2 1981):

> "[i]t would be anomalous for a federal court to apply a state policy restricting remedies against public officials to a federal statute that is designed to augment remedies against those officials, especially a federal statute that affords remedies for the protection of constitutional rights."

Multiplying the unpredictability of application to serve late notice of claim by the heterogeneity of the many notice of claim statutes around the country produces a maze which is constitutionally unsuitable for passage by a party, often without funds or counsel, seeking to redress violations of the Civil Rights Act. Quite simply, the New York Court of Appeals decision is bad precedent with mischievous, indeed ominous implications for civil rights claims and constitutional supremacy in our federal system.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal. If, however, it is concluded that probable jurisdiction is wanting, Appellant respectfully requests this Court to consider this Jurisdictional statement as a Petition for Certiorari and to grant the Petition for the reasons stated herein.

Respectfully submitted,

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APPENDIX

State of New York
Court of Appeals

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4 No. 399
423 South Salina Street, Inc.,
Appellant,
v.
City of Syracuse, &c., et al.,
Respondents.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

(399) Justin L. Vigdor, Rochester, for appellant.

C. Frank Harrigan, Syracuse Corporation Counsel (James L. Gelormini of counsel) for respondent City.

William L. Allen, Jr., Syracuse, for respondent Metropolitan Development & Amlea.

MEYER, J.

Although plaintiff, 423 South Salina Street, Inc., lacked standing necessary to enjoin the City of Syracuse from transferring real property taken by the City for nonpayment of taxes, it has standing to maintain an action pursuant to the Federal Civil Rights Act of 1871 (42 USC §1983) for damages resulting from the City's alleged misuse of its taxing power. Moreover, its complaint states a cause of action under that section which, being governed as to limitations by CPLR 214(5), was timely brought. The action is, however, barred by plaintiff's failure to serve a notice of claim as required by General Municipal Law §50-i, which failure likewise barred any claim based upon violation of the New

York State Constitution. The order of the Appellate Division should, therefore, be affirmed, with costs.

I

In September 1976, plaintiff purchased from the University of Rochester property which the University had leased to the W.T. Grant Company in 1944. Grant constructed a five-story building on the property which it then sold to and leased back from the University. The lease required Grant to pay an annual rent of $77,322.32 and all taxes, utility charges, insurance and maintenance costs.

The City assessed the property for each year since 1964 at $1,135,700. Assessment review proceedings for the years 1971-1976 were begun, but Grant's tenancy ended in 1976 when it went bankrupt and vacated the premises.

The University then sold the property to plaintiff for $25,000, plaintiff agreeing to assume liability for the unpaid 1976 taxes, penalties and interest on the property, which brought the total consideration to $175,774.32. Plaintiff, however, neither paid those taxes, nor the taxes for ensuing years 1977-1979, nor when tax sales were conducted for the 1976-1978 arrearages did it seek to redeem the property within a year after the sale as permitted by Real Property Tax Law §1010. On April 9, 1979, the City of Syracuse took a tax deed to the property, but in the following month plaintiff obtained a preliminary injunction restraining the City from transferring title to the property until completion of the 1976-1979 assessment review proceeding.

That proceeding ended on April 2, 1981 with our affirmance of the Appellate Division's modification of the property assessments for the years 1971-1976, in an opinion which noted the "aggravated pattern of misuse of the taxing power" by the City

(52 NY2d 496, 518). The order affirming the grant of the preliminary injunction was, however, reversed. The opinion held that there is equitable power to enjoin collection of a tax when there is a clear showing of intentional overassessment tantamount to fraud and the taxpayer was without relief from the imminent deprivation of his property. It concluded, however, that while Grant may have been entitled to such an injunction, plaintiff, by reason of its failure to pay the 1976-1979 taxes, lacked "equitable standing to assert the aggravated pattern of tax abuse to which its predecessor in interest was subject as the basis for injunctive relief" (52 NY2d at 518).

On April 2, 1982 plaintiff commenced a §1983 action in federal court as to which a lis pendens was recorded. That action was, however, dismissed on grounds of comity (566 Fed Supp 484) and that dismissal was affirmed by the Second Circuit (724 F2d 26) on December 14, 1983. Plaintiff then commenced the present action on an essentially identical complaint, well within the six-month period allowed by CPLR 205(a) (*Gross* v *Newburger Loeb & Co.*, 85 AD2d 709; 1 Weinstein-Korn-Miller, New York Civil Practice, ¶205.09) and promptly thereafter recorded a lis pendens as to it. On November 22, 1983 the City conveyed the property to defendant Metropolitan Development Foundation and on December 19, 1983 the Foundation conveyed the property to defendant Amlea (New York) Inc.

All three defendants moved to dismiss the complaint, the City upon the grounds that the plaintiff lacked standing, that the complaint failed to state a cause of action and that the action was barred by plaintiff's failure to serve a notice of claim within the applicable statute of limitations; defendants Metropolitan and Amlea on the grounds that the complaint stated no cause of action against them and that any action was barred by limitations. Special Term dismissed the complaint holding the action

barred as to the City by plaintiff's failure to comply with the notice of claim provisions of the City Charter and by the one-year-90-day limitation provision of General Municipal Law §50-i(1)(c), and as to defendants Foundation and Amlea that no cause of action was stated against them. On appeal to the Appellate Division that court affirmed, concluding, in light of our prior holding in *W.T. Grant Co.* v *Srogi* (52 NY2d at 518, *supra*), that plaintiff "was not the one subjected to this unlawful conduct," that the City had not violated plaintiff's civil rights and that, therefore, the complaint failed to state a cause of action (112 AD2d 745). Plaintiff's appeal to this Court was dismissed on the ground that no substantial constitutional question was directly involved (66 NY2d 914), but its motion for leave to appeal, thereafter made, was granted (67 NY2d 605).

Before us plaintiff argues that it has standing to maintain the action, that the complaint states a cause of action, that the applicable statute of limitations is three years, that the notice of claim provision is inapplicable but in any event was substantially complied with, and that the courts below abused their discretion in failing to grant it leave to replead its state constitutional claims. We conclude that plaintiff has standing to seek damages from the City, but not against the Foundation and Amlea, that the complaint states a cause of action to which the three-year statute applies, but that both the present action and any action that could be pleaded under the State Constitution are barred by plaintiff's failure to give the required notice of claim.[1] We, therefore, affirm.

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[1] Although our notice of claim holding is a sufficient basis for affirmance and we would, therefore, normally find it unnecessary to consider the other grounds, we deem it appropriate to do so in the present case because they are directly raised by the motions to dismiss.

II

The Appellate Division erred in extending our holding in *W.T. Grant Co.* v *Srogi, supra,* beyond the facts on which it was based (*see, J.A. Preston Corp.* v *Fabrication Enterprises,* ____NY2d____ [decided herewith]). As the language quoted above from the *Grant* opinion makes clear, we held only that plaintiff "lacks *equitable* standing to assert the aggravated pattern of tax abuse to which its predecessor in interest was subject *as the basis for injunctive relief.*" But as the discussion preceding that conclusion evidences, the factual basis of the claimed abuse of the taxing power set forth in the papers before the Court was "quite compelling" (52 NY2d at 517) and might have been sufficient to justify restraining the City from transferring the Grant property, notwithstanding that restraints on enforcement of revenue collection are, and must be if government is to continue to function, the exception rather than the rule. Grant of the injunction was reversed not alone because plaintiff's predecessor, rather than plaintiff, had been "subjected to this unlawful conduct" (52 NY2d at 518), but also because plaintiff, having purchased the property with the understanding that it would assume all tax liability then owing, had never paid the taxes. Thus, it was not a lack of likelihood of success on the merits, but a balancing of the equities, which favored the City rather than plaintiff, that was the basis for the conclusion that plaintiff was without standing to obtain equitable relief.

It was not, however, a holding that plaintiff had no standing to sue for damages or had not sufficiently stated a cause of action for damages. Notwithstanding CPLR 103(a) and its predecessor provisions, "the distinctions between law and equity * * * are still very much with us" (McLaughlin, Practice Commentary, McKinney's Cons Laws of NY, Book 7B, CPLR 1 to 300, p 14). A §1983 plaintiff who, because he has not demonstrated irrepara-

ble injury is not entitled to injunctive relief, is not thereby barred from recovery of damages in the action (*City of Los Angeles* v *Lyons,* 461 US 95, 111-113). Likewise, as a matter of state procedure we have long recognized that "a court of equity * * * may order a sum of money to be paid to the plaintiff and give him a personal judgment therefor when that form of relief becomes necessary in order to prevent a failure of justice and when it is for any reason impracticable to grant the specific relief demanded" (*Doyle* v *Allstate Ins. Co.,* 1 NY2d 439, 443; *Ungewitter* v *Toch,* 26 NY2d 687, affg 31 AD2d 583; *Kaminsky* v *Kahn,* 23 AD2d 231, 237).

Thus, plaintiff has standing to maintain its cause of action for damages. It does not, however, have standing to obtain equitable relief in the form of vacatur of the deed taken by the City, of the City's deed to the Foundation and of the Foundation's deed to Amlea. We need not consider whether the public policy upon which the lis pendens provisions of CPLR 6501 is based is overborne by the policy discussed in *W.T. Grant Co.* v *Srogi, supra,* against impeding the right of the municipality to collect revenues, or the *res judicata* effect of our reversal of the preliminary injunction granted in the prior assessment review proceeding (cf. *J.A. Preston Corp.* v *Fabrication Enterprises, supra*), for plaintiff has offered no explanation for its failure to pay the taxes found due in that prior proceeding. Its failure to pay those taxes was at least in part a predicate for the 1979 tax deed. Moreover, plaintiff has made no offer in this proceeding to pay taxes due on the property for any of the open years, notwithstanding the long-standing rule that it is a condition precedent to a plaintiff's obtaining equitable relief that the plaintiff himself do equity (*Duggan* v *Platz,* 263 NY 505, 507).

Because plaintiff is without standing to seek vacatur of the deed, dismissal of so much of the complaint as sought that relief

was proper, and, defendants Foundation and Amlea having been joined as defendants only with respect to that relief, dismissal of the complaint as to them was also correct.

III

There remains for discussion whether plaintiff's cause of action against the City for damages is sufficient and, if so, whether it is barred either by limitations or by the failure to file a notice of claim. We conclude that a cause of action is stated and that the action was timely brought, but that the failure to file a notice of claim is fatal to the action.

The City's insistence that no cause of action is stated is predicated on its contentions that plaintiff seeks to recover for injury to others, that the exercise of the taxing power cannot constitute a taking, and that plaintiff has an adequate state remedy. As to the first, plaintiff responds that it acquired from the University not only the property but all of the University's rights incident thereto, including its interest in pending tax proceedings. While plaintiff may be able to prove at trial that it in fact succeeded to the University's rights with respect to constitutional violations antedating September 1976, nothing in the record establishes its acquisition of more than the property itself. That does not conclude the matter, however, for plaintiff was directly involved as the taxpayer as to the 1976-1980 assessments, during which period the pattern of overassessment in each year, notwithstanding prior decisions reducing by some two-thirds the prior assessments imposed, continued, culminating in the City's deeding the property to itself in 1979.

Thus the gravamen of plaintiff's complaint is not just that the taxes imposed were excessive but that it has been the victim of "an aggravated pattern of misuse of the taxing power," begun against its predecessor and continued as to it, which sought to

require it to pay excessive taxes on the property involved despite rulings that prior assessments "were unlawful by reason of overvaluation" (52 NY2d at 518). That such an abuse of the taxing power may constitute a denial of due process was declared long ago by this Court (*Gordon* v *Cornes*, 47 NY 608, 612). And that the facts alleged in the complaint sufficiently describe an abuse tantamount to constitutional violation appears from the description of the "pattern of misuse," which operated against the University prior to 1976 and continued after plaintiff's acquisition of the property in 1976 to operate against it, set forth in the Appellate Division's *Grant* opinion (71 AD2d at 474):

> It is not difficult to sort out the considerations at work here. The city's constitutional debt limit and the amount of important financial aid it receives are computed by the total assessed value of the real property in the city. An important segment of any municipal assessment roll is the commercial properties of its downtown shopping area. These properties not only contribute high values to the assessment roll, but downtown property owners represent a relatively innocuous part of the city constituency. Thus, there is much to win and little to risk by keeping downtown assessments high.

Although plaintiff did not pay the taxes for 1976 and thereafter, its complaint alleges that it was unable to do so because "all potential lessees and purchasers ultimately refused to rent or buy because of the onerous and unlawfully excessive taxes." A §1983 cause of action for damages resulting from the City's alleged violation of plaintiff's constitutional rights is sufficiently stated.

Moreover, the fact that plaintiff may have a state remedy in inverse condemnation (*see, Matter of Keystone Assoc.* v *Moerdler*, 19 NY2d 78; *Ferguson* v *Village of Hamburg*, 272 NY 234; *Gordon* v *Cornes, supra*) does not require dismissal of its §1983 cause of action. The Supreme Court "has not interpreted §1983 to require a litigant to pursue state judicial remedies prior to com-

mencing an action under this section" (*Board of Regents* v *Tomanio,* 446 US 478, 491). The City's argument to the contrary is predicated upon cases such as *Hudson* v *Palmer* (468 US 517) and *Collier* v *City of Springdale* (733 F2d 1311, cert denied 469 US 857) considering whether, in light of *Parratt* v *Taylor* (451 US 527),[2] a due process violation could be found to exist if the state provides a meaningful post-deprivation remedy. But, as the Sixth Circuit held in *Wilkerson* v *Johnson* (699 F2d 325, 329), to apply *Parratt* outside the prisoners' rights context is inconsistent with Supreme Court decisions, beginning with *Monroe* v *Pape* (365 US 167),[3] holding that a §1983 plaintiff is not barred by the availability of a state court remedy. In any event, *Hudson* and *Parratt* were concerned with whether there had been a due process violation when a post-deprivation hearing had been provided, not whether, as is here alleged, a municipality may, having provided due process for the determination of a tax assessment, obtain for itself a taxpayer's property by repeatedly and for an impermissible purpose refusing to abide by the assessment determination, with the result that the property can neither be rented nor sold and is eventually taken by the City for nonpayment of the excessive taxes thus imposed. The due process violation for which plaintiff seeks recompense is, thus, not related to determination of the tax assessment, but to the City's refusal to abide by the determination made in plaintiff's favor. In that context, "the remedy provided in §1983 [is] independently enforceable whether or not it duplicates a parallel state remedy" (*Wilson* v *Garcia,* ____US____, ____, 105 S Ct 1938, 1949).

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[2] Overruled on an unrelated issue *Daniels* v *Williams* (____US____, 54 USLW 4090).

[3] Overruled on an unrelated issue *Monell* v *New York City Dept. of Social Services* (436 US 658, 663).

B

The present action, having been commenced within six months after the Second Circuit's affirmance of the dismissal of the prior federal action, is timely if that action was timely brought (CPLR 205[a]; *Wooster* v *Forty Second St. etc. R.R. Co.*, 71 NY 471; *Buchholz* v *United States Fire Ins. Co.*, 269 App Div 49, appeal dsmd 294 NY 807). The City rightly contends that after the Supreme Court's decision in *Wilson* v *Garcia* (____US____, 105 S Ct 1938) our holding in *Fields* v *Board of Higher Educ. of City of N. Y.* (63 NY 827, affg 94 AD2d 202) that CPLR 214(2) governing liability created by statute applies to §1983 actions is no longer good law. We disagree, however, with its argument that the one-year-90-day period established by General Municipal Law §50-i(1), rather than the three-year period governing actions for damages for personal injuries (CPLR 214[5]), applies under the *Wilson* rationale.

Wilson held that uniformity within each state was consistent with the borrowing principle contained in 42 USC §1988 and that that statute should, therefore, be "construed as a directive to select, in each State, the one most appropriate statute of limitations for all §1983 claims" (____US at ____, 105 S Ct at 1947). Although it was argued that the action before it, for personal injuries resulting from an assault by a New Mexico State Police Officer, was barred by New Mexico's two-year statute covering "[a]ctions against a governmental entity or a public employee for torts," the Supreme Court held that the three-year statute applicable generally to actions for injury to the person had been correctly applied. It reasoned that §1983 conferred a general remedy for injuries to personal rights and rejected the shorter statute applicable to tort actions against public employees because (____US at ____, 105 S Ct at 1949):

> we are satisfied that Congress would not have characterized

> §1983 as providing a cause of action analogous to state remedies for wrongs committed by public officials. It was the very ineffectiveness of state remedies that led Congress to enact the Civil Rights Acts in the first place. Congress therefore intended that the remedy provided in §1983 be independently enforceable whether or not it duplicates a parallel state remedy. The characterization of all §1983 actions as involving claims for personal injuries minimizes the risk that the choice of a state statute of limitations would not fairly serve the federal interests vindicated by §1983. (Footnote and citations omitted).

That reasoning answers as well the City's suggestion that the three-year provision of CPLR 214(5) should not be applied because to do so will, in light of General Municipal Law §50-e(5), also extend to three years the time to apply for permission to serve a late notice of claim. That the shorter one-year-90-day provision of GML §50-i would limit the permissible extension as to a notice of claim relating to a personal injury claim against a municipality is simply irrelevant under *Wilson's* reasoning. If the shorter statute governing public employee torts is not to be applied to bar the action altogether, it should not be applied to bar an application for extension of time to file a notice of claim. The more particularly is this so in light of the factors which GML §50-

e(5) requires the court to consider when presented with an extension application.[4]

Finally as to limitations, it is only necessary to note that the culmination of the City's alleged abuse of the tax assessment process was the transfer by the City to itself of plaintiff's property on April 9, 1979, less than three years before the federal action was begun. The City argues, in an apparent effort to obtain dismissal of Count I of the complaint, that that count excludes the taking of the April 9, 1979 deed as an element. Dismissal would be improper, however, because paragraph 26 of the complaint specifically alleges the taking of the tax deed by the City and attaches a copy of the deed to the complaint. That allegation is realleged as part of Count I in paragraph 71 and the allegations of Count I are realleged as part of Count II. Whether and, if so, to what extent acts of the City antedating April 2, 1979

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[4] General Municipality Law §50-e(5) provides that: "Upon application, the court, in its discretion, may extend the time to serve a notice of claim specified in paragraph (a) of subdivision one. The extension shall not exceed the time limited for the commencement of an action by the claimant against the public corporation. In determining whether to grant the extension, the court shall consider, in particular, whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including: whether the claimant was an infant, or mentally or physically incapacitated, or died before the time limited for service of the notice of claim; whether the claimant failed to serve a timely notice of claim by reason of his justifiable reliance upon settlement representations made by an authorized representative of the public corporation or its insurance carrier; whether the claimant in serving a notice of claim made an excusable error concerning the identity of the public corporation against which the claim should be asserted; and whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits. An application for leave to serve a late notice shall not be denied on the ground that it was made after commencement of an action against the public corporation."

should be excluded would, were we not dismissing for other reasons, be for the Trial Judge to pass upon at trial, but dismissal of Count I on limitations grounds would, at this point, be premature.

C

Dismissal of the complaint is, however, required by reason of plaintiff's failure to file the notice of claim called for by General Municipal Law §50-e or to apply for an extension of time to do so within the three-year limitations period. Plaintiff argues that our decision in *Mills* v *County of Monroe* (59 NY2d 307, cert denied 464 US 1018) should be repudiated as a matter of federal supremacy, that the Syracuse City Charter notice of claim provision is preempted by state law, that the present action is within *Mills'* public interest exception, and that it has, in any event, substantially complied with the requirement.

1.

The applicability to a §1983 action of a state notice of claim provision, involving as it does construction of 42 USC §1988, is a matter of federal law, but when, as here, there is neither a decision of the Supreme Court nor uniformity in the decisions of the lower federal courts, a state court required to interpret a federal statute is not bound to follow the decision of the federal courts or precluded from exercising its own judgment (*Flanagan* v *Prudential-Bache Sec.*, 67 NY2d 500, 506, cert denied ____US____, 55 USLW 3315).

In *Chardon* v *Soto* (462 US 650, 657) the Supreme Court identified the policies governing whether a local procedural rule should be borrowed as "deterrence, compensation, uniformity, or federalism." In concluding in *Mills* that the notice of claim

provision of County Law §52[5] applied to a §1983 cause of action, we pointed out that such provisions serve an important state interest in that the governmental subdivision is allowed a meaningful opportunity to investigate the claim in a timely manner and thus protect itself against fraudulent claims and that General Municipal Law §50-e authorizes a court to extend the time to file such a notice to the full limitations period upon a finding that the delay has not caused the municipality substantial prejudice. That authority, we reasoned, and the fact that the statute is not applied to an action to vindicate a public interest give the statute a flexibility such that it could not be said to offend the federal policy underlying the Civil Rights Act section there involved (42 USC §1981). Furthermore, the opinion noted, such a provision is not inconsistent with federal law merely because it may cause the plaintiff to lose (citing *Board of Regents* v *Tomanio,* 446 US 478, 488, quoting *Robertson* v *Wegmann,* 436 US 584, 593).

The policy considerations favoring application have also been discussed in *Cardo* v *Lakeland Cent. School Dist.* (592 F Supp 765) and by the dissenting judges in *Brown* v *United States,* 742

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[5] In the present action the City relies upon both §8-115(2) of the Syracuse City Charter and General Municipal Law §50-i. Plaintiff's argument that the City Charter is a local law is incorrect, the Charter having been adopted by general statute (Laws of 1885, ch 26) and amended to include the notice of claim provision by like statutes (Laws of 1905, ch 682). Plaintiff also contends that GML §50-i(2) makes its provisions applicable rather than the City Charter section. We do not find it necessary to decide whether the Charter's broader coverage makes it inconsistent with §50-i, for *Wilson* v *Garcia, supra,* having characterized §1983 actions as involving claims for personal injury, such "constitutional tort" actions (*Pauk* v *Board of Trustees of City Univ. of N. Y.,* 654 F2d 856, 866, cert denied 455 US 1000) are within the notice of claim requirements of §50-i, although for the reasons above stated (p 11) not within its one-year-90-day limitation period. For like reason such claim as the complaint asserts based on the State Constitution is also barred by reason of the failure to give notice of claim (*Phelps Steel* v *City of Glens Falls,* 89 AD2d 652), and we, therefore, need not consider plaintiff's suggestion that it should have been granted leave to replead to flesh out that claim.

F2d 1498, cert denied ____US____, 105 S Ct 2153).[6] *Cardo,* referring to *Mills'* state interest reasons, added that the two principal policies embodied in §1983 were deterrence and compensation and, adopting the reasoning of the Supreme Court in *Tomanio* (*supra,* 446 US at 488) with respect to the statute of limitations there involved, concluded that "[n]either of these policies is significantly affected by the notice of claim requirement, since plaintiffs can readily enforce their claims, thereby recovering compensation and fostering deterrence, simply by filing a timely notice of claim" (592 F Supp at 773).

The *Brown* dissent answered the majority's contention that federal law was to be considered deficient only if it did not supply a universally familiar procedural aspect of litigation by pointing to *Robertson* v *Wegmann* (436 US 584), in which the Court borrowed a state survivorship statute which caused the action to abate, finding no inconsistency in so doing, and to cases applying local rules which preclude tolling of limitations while an independent action is being pursued (*Board of Regents* v *Tomanio, supra*) and start the running of limitations anew when a tolling period ends (*Chardon* v *Soto, supra*).

More importantly, however, the dissent pointed to the ubiquity of notice of claim provisions and to the facts that they serve many of the same policies as do statutes of limitations, that they go to the remedy in the same way that a limitations statute does, that the wide range of services provided by a municipality makes it

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[6] Brown concerned a "constitutional tort" action brought under *Bivens* v *Six Unknown Agents of Federal Bureau of Narcotics,* 403 US 388, §1983 not having been made applicable to the District of Columbia at the time of the incident involved in *Brown,* 742 F2d at 1500, nn 1, 2. The considerations involved are, however, essentially the same. Indeed, the opinions rely on a number of §1983 cases. *Brown* was decided *en banc* by the Court of Appeals for the District of Columbia Circuit, the court dividing 7 to 4 against application of a District notice of claim provision.

more likely that it may cause injury without knowing that it has done so, that the notice of claim required to be filed does not require the kind of preparation necessary for litigation and leaves the claimant with an additional two and one-half years to investigate, negotiate, settle or sue. It noted also that none of the four policies identified by the Supreme Court in *Chardon* v *Soto, supra,* would be offended by a notice of claim provision: deterrence and compensation for the same reason advanced in *Tomanio* and *Cardo, supra;* uniformity because, as *Robertson* v *Wegmann* stated (436 US at 594, n 11), "reliance on state law obviously means that there will not be nationwide uniformity on these issues," and federalism because a notice of claim statute ensures freshness of evidence, helps prevent unreasonable claims and promotes justice.

With respect to deterrence, we add that because a municipal official can never know in advance whether an injured party will file a timely notice of claim or be granted leave to file a late notice of claim, the effect of the provision is practically nil (cf. *Robertson* v *Wegmann,* 436 US at 592, *supra*). And with respect to the purposes served by a notice provision, we note the not inconsiderable benefit in reducing the burden on courts, both state and federal, when the notice results in negotiation and settlement of claims rather than litigation.

The considerations against applying a notice of claim provision have been discussed by the *Brown* majority, and in *Williams* v *Allen* (616 F Supp 653) and *Burroughs* v *Holiday Inn* (606 F Supp 629, on rehearing 621 F Supp 351). The reasoning of the *Brown* majority was that borrowing is to be indulged in only when there is a deficiency in the federal scheme and not to do so is inconsistent with federal policy, that the borrowing of state procedural rules has been limited to rules that "clearly establish the point at which a cause of action ends" (742 F2d at 1505), that a

notice of claim provision has a purpose quite distinct from statutes of limitation, tolling provisions and survival rules, that the application of a local procedural rule "that would significantly inhibit the ability to bring federal actions" (742 F2d at 1507) was not reasonable, and that the notice of claim provision was a condition precedent to accrual of a right against the municipality and had its roots in sovereign immunity which is antithetical to the federal scheme. *Mills* was distinguished by the majority because of "the unusual flexibility of the relevant New York provision; it was subject to waiver by the court if to waive would promote equity or the action would vindicate 'the public interest' " (742 F2d at 1509 n 6).[7]

Williams, like the *Brown* majority opinion, reasoned that application of notice of claim provisions would effectively extinguish an important federal right and found a potential for confusion and inequity in the public interest exception referred to in *Mills,* which would result in barring an individual claimant who failed to give notice and sued for himself alone rather than in the public interest. And the *Burroughs* court found no void or deficiency in the federal statute that made it incomplete without resort to state law, and on reconsideration read *Wilson's* refusal to apply the state limitations statute applicable to governmental torts as inconsistent with application of a notice of claim provision.

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[7] *Fuchilla* v *Layman* (210 NJ Super 574, 510 A2d 281) distinguished *Mills* on this basis also.

We are persuaded that application in federal civil rights actions of the notice of claim requirements of GML §50-i as limited by GML §50-e is proper.[8] Whatever may be the situation with respect to the statutes of other states, it cannot be said that the provisions of §50-i interpose an added element in the federal cause of action. The cause of action arises when the conduct involved occurs and will only be barred if the claimant neither gives notice within 90 days, nor within the next two years and nine months seeks an extension of the right to do so. Moreover, such an application for leave to serve a late notice "shall not be denied on the ground that it was made after commencement of an action" (GML §50-e[5]). The provision is, therefore, essentially the same as a statute of limitations, balancing the same interests as does such a statute, but adding a notice procedure that is not difficult to comply with (cf. *Burnett* v *Grattan,* 468 US at 50). More importantly, in view of the opportunity afforded by §50-e(5) of applying for leave to file a late notice, the failure to file such a notice within the 90-day period prescribed in §50-e(1)(a) is not necessarily fatal to plaintiff's case. Compliance will, as noted above, have no practical effect on deterrence at all and will affect compensation only as to those who have, as did the present plaintiff, slept on both the

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[8] Cases refusing to apply a notice of claim statute are in the majority, but except for the three above discussed advance no reason, other than precedent, for the conclusion (*Rosa* v *Cantrell,* 705 F2d 1208, 1221, cert denied 464 U8 821; *Brandon* v *Board of Educ.,* 635 F2d 971, 973, n 2, cert denied 454 US 1123; *May* v *Enomoto,* 633 F2d 164, 167; *Doty* v *City of Rochester,* 625 F Supp 829; *Williams* v *Allen, supra; Burroughs* v *Holiday Inn, supra; Altaire Builders, Inc.* v *Village of Horseheads,* 551 F Supp 1066; *Glover* v *City of New York,* 401 F Supp 632; *Carrasco* v *Klein,* 381 F Supp 782; *Laverne* v *Corning,* 316 F Supp 629; *Williams* v *Horvath,* 16 Cal 3d 834, 548 P2d 1125; *Overman* v *Klein,* 103 Idaho 795, 654 P2d 888; *Fuchilla* v *Layman, supra; Doe* v *Ellis,* 103 Wis 2d 581, 309 NW2d 375). Cases applying such a provision to a §1983 action, in addition to *Mills* and *Cardo* discussed above, are *Deary* v *Three Unnamed Police Officers* (746 F2d 185) and *Indiana Department of Public Welfare* v *Clark,* 478 NE2d 699, cert denied 54 USLW 3809).

right to give the required warning of impending suit to the municipality *and* the right to obtain leave of court, at any time during the full three-year limitation period, to give notice late. Nor in our view does the public interest exception for state agency enforcement proceedings, or for class action type proceedings normally involving a private attorney general type of action, militate against application of §50-e to an individual claim for damages such as is here involved.

In light of the foregoing analysis and bearing in mind that the Supreme Court has yet to consider the question, we conclude that General Municipal Law §50-i is applicable to this action.

2.

Plaintiff's contentions that the action is within the public interest exception and that it has substantially complied with §50-e may be more quickly answered. *Union Free School Dist. No. 6 of Towns of Islip & Smithtown* v *New York State Human Rights Appeal Bd.* (35 NY2d 371, 380) involved enforcement by the State Division of Human Rights of an order made by it acting in the public interest. But as we later made clear in *Board of Educ.* v *New York State Div. of Human Rights* (44 NY 902, 904), notice of claim provisions do apply to proceedings before the Division when "only enforcement of private rights" is sought. *Mills* stated the scope of the exception as "actions that are brought to protect an important right, *which seek relief for a similarly situated class of the public,* and whose resolution would directly affect the rights of that class or group" (59 NY2d at 311 [emphasis supplied]). As in *Mills,* so here, although plaintiff avers that the City has engaged in unlawful practices affecting others than plaintiff, the relief sought was limited to enforcement of plaintiff's private rights rather than the vindication of rights of similarly situated downtown property owners as a class.

Nor can plaintiff's application in the tax assessment proceeding for a preliminary injunction or the notice of claim filed under the Eminent Domain Procedure Law constitute substantial compliance with GML §50-e. Neither set forth any claim under the Civil Rights Act (*Alaxanian* v *City of Troy,* 69 AD2d 937; *see, Davidson* v *Bronx Hospital,* 64 NY2d 59). The EDPL notice was not filed within the required 90 days after the City took the tax deed, and, as already noted, plaintiff never sought leave to file a late notice as permitted by GML §50-e(5). Nor, no notice of claim having been filed, was there any basis for the exercise by the lower courts of the discretion vested in them by GML §50-e(6).

For the foregoing reasons, the order of the Appellate Division should be affirmed, with costs.

* * *

Order affirmed, with costs. Opinion by Judge Meyer. Chief Judge Wachtler and Judges Simons, Alexander, and Titone concur. Judges Kaye and Hancock took no part.

Decided November 20, 1986

56 423 SOUTH SALINA STREET, INC., Appellant, v CITY OF SYRACUSE et al., Respondents.—Order unanimously affirmed, without costs. Memorandum: Plaintiff appeals from an order dismissing its complaint in an action brought under the Federal civil rights statute (42 USC § 1983) alleging that the City of Syracuse deprived it of its property by continually grossly overassessing its property after the assessments had been reduced by the courts in tax reduction proceedings.

We affirm because the complaint fails to state a cause of action. Although an aggravated and persistent pattern of tax abuse may constitute a taking or a deprivation of property in violation of a property owner's civil rights, the facts alleged in the complaint show that "[plaintiff] was not the one subjected to this unlawful conduct" (*Grant Co. v Srogi,* 52 NY2d 496, 518). In this action, therefore, plaintiff cannot rely upon the violation of its predecessor's constitutional rights, and following the reasoning of the Court of Appeals in *Grant Co. v Srogi (supra),* we find that the city's conduct directed against the plaintiff was insufficient to constitute a taking or a deprivation of property in violation of plaintiff's civil rights. (Appeal from order of Supreme Court, Onondaga County, Murphy, J. — dismiss complaint.) Present—Callahan, J.P., Boomer, Green, Pine and Schnepp, JJ.

STATE OF NEW YORK
SUPREME COURT
COUNTY OF ONONDAGA

423 SOUTH SALINA STREET, INC.,
Plaintiff,

v

THE CITY OF SYRACUSE, A Municipal Corporation, METROPOLITAN DEVELOPMENT FOUNDATION OF CENTRAL NEW YORK, INC., a Not for Profit Corporation, and AMLEA (NEW YORK) INC., a Business Corporation,
Defendants.

DECISION

APPEARANCES:

MOUSAW, VIGDOR, REEVES,
HEILBRONNER & KROLL
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MURPHY, J.:

This is a motion brought by defendant seeking an order dismissing the complaint. The stated grounds for relief are that the action is time barred by reason of plaintiff's failure to serve a notice of claim or to commence the action within the applicable Statute of Limitations; that the complaint fails to state a cause of action; that the equitable relief sought is barred by laches and by plaintiff's lack of standing; that the punitive damage claim may not be asserted against the defendant, City, and to the extent that the complaint asserts claims under 42 U.S.C. Section 1985 and 1986, that such claims are barred by *res judicata*.

The facts indicate that in 1982, the plaintiff commenced an action in the United States District Court (Northern District of New York) against the City and certain of its officers allegedly based on the same complaint that is now before the Court. In this action the individual City officials have been dropped as parties and the MDA Foundation, Inc. and Amlea (New York) Inc., have been added as parties. The District Court (Munson, J.) dismissed the claims under 42 U.S.C. Sec. 1983, on the grounds of Comity and the Tax Injunction Act (28 U.S.C. 1341), which dismissal was not on the merits.

A reading of the decision of Judge Munson reveals that the claims asserted under 42 U.S.C. Sections 1985 and 1986 were dismissed on the merits. On appeal, the United States Court of Appeals for the Second Circuit affirmed the dismissal of the Section

1983 claims and also a dismissal on the merits of the Section 1985 and Section 1986 claims, although on different grounds.

Plaintiff purchased the improved real property located in downtown Syracuse on September 26, 1976, from the University of Rochester. Plaintiff acquired the property for $25,000.00 subject to approximately $130,000.00 in unpaid 1976 real estate taxes imposed on the property by the City of Syracuse.

The record shows that after acquisition, plaintiff never paid the 1976 taxes nor any amounts, as reduced by the Appellate Division of the New York State Supreme Court, or after a decision by the New York Court of Appeals, finally fixing the assessment.

On April 9, 1979, a tax deed to the property was issued to the City of Syracuse by reason of plaintiff's tax delinquency to effect the collection of the unpaid 1976 taxes. After the City took a tax deed, the plaintiff applied for and was granted a preliminary injunction preventing the City from transferring the property to third parties, which injunction was set aside on appeal by the New York Court of Appeals on April 9, 1981.

On November 22, 1983, the City deeded its interest in the property to defendant MDA Foundation, Inc. On December 14, 1983, plaintiff's federal action was dismissed by the U.S. Court of Appeals. On December 19, 1983, the defendant MDA Foundation, Inc., deeded its interest in the property to defendant Amlea (New York) Inc.

The action before this Court was commenced on March 6, 1984. The complaint seeks to vacate the tax deed and an award of money damages upon the basis that plaintiff's constitutional rights were violated. Plaintiff claims that prior to the taking of the tax deed, the assessment practices of the city with respect to

the subject property destroyed its value, and that the tax deed itself violated its constitutional rights.

An affidavit signed by William L. Allen, Jr., Esq., the attorney for the defendants The Metropolitan Development Foundation of Central New York, Inc., and Amlea (New York), was submitted in support of their motion to dismiss the complaint for failure to state a cause of action and on the further grounds that the action is barred by the Statute of Limitations. He states that there are no allegations to show that defendants MDF and Amlea did any acts which make them liable to plaintiff under the provisions of Section 1983.

For the following reasons set forth in this decision, the Court grants the motion of the defendant City of Syracuse.

The first point raised by the defendant City is that the plaintiff's failure to serve a notice of claim bars the money damage claims and the second point is that the action is governed and barred by the year and 90-day period of *General Municipal Law* Section 50-1(1)c.

Two statutes require a notice of claim against the City. The first is a general law applicable to all municipalities, Section 50-i(1)(a) of the *General Municipal Law*, which requires a notice of claim to be served in accordance with Section 50(e) of the *General Municipal Law* in any action against a municipality based on its negligent or wrongful acts. The second is the broader notice of claim provisions of the current Syracuse City Charter, which requires a notice of claim for any action based upon an alleged "omission of duty, wrongful act, fault, neglect, misfeasance, or negligence" of the City.

This Court agrees with the arguments proposed by the defendant City on the notice of claim issue. In the case of *Mills v County*

of Monroe, 59 NY2d 307 (1983), the New York Court of Appeals held that a civil rights action cannot be maintained against a municipality unless notice of claim statutes are complied with. The Court stated that "the requirement of notice is one of the safeguards devised by the law to protect the municipalities against fraudulent and stale claims for injuries to person and property . . . [t]herefore, the general restrictive effect of the state notice of claim requirement does not of itself bar its application to Federal civil rights actions".

In the *Mills* case, *supra*, the Court also stated "this Court, however, does not find that the State's notice requirements are antithetical to the policy underlined in the civil rights laws".

A comparison of the City Charter and Section 52 of the *County Law,* which was the statute construed in *Mills,* reveals that the language in both is similar. However, under the reasoning of *Mills,* Sec. 50-e is also applicable to this claim and bars it.

The City also cites *Phelps Steel v City of Glens Falls,* 89 AD2d 652 (3rd Dept., 1982). That case states that "the claim against the City is a claim for money damages allegedly caused by [the City's] failure to discharge a duty imposed by law, i.e., to provide compensation for the taking of private property for public use. It clearly sounds in tort . . . and consequently a notice of claim is required to be served upon the City . . . pursuant to Sec. 50-e of the *General Municipal Law*".

The Court cannot accept the argument raised by the plaintiff that the City has acquired knowledge of the facts underlying plaintiff's claim. As the *Mills* case, *supra,* explains, the statute itself permits relief from the notice requirement through an application to the Court to serve a late notice of claim. (See *General Municipal Law,* Sec. 50-e subd. 5) At the time a motion is made, it is incumbent upon the Court to determine whether the City

may have acquired knowledge of the facts underlying the plaintiff's claim as well as consider other factors.

Even where a duly filed notice of claim exists, the failure to mention a federal civil rights claim in the notice prohibits a plaintiff from asserting a federal civil rights claim in the underlying action. (*Alaxanian v City of Troy,* 69 AD2d 937 [3rd Dept., 1979])

With respect to the argument concerning the one year and 90-day Statute of Limitations, this Court is aware that the State Appellate Divisions and the Federal Courts differ in their opinions concerning the applicability of the statute. However, this Court will be bound by the determination made by the Fourth Department in the case of *Staffen v City of Rochester,* 80 AD2d 16 (4th Dept., 1981). The Fourth Department has unanimously held that the year and 90-day period of *General Municipal Law* Sec. 50-i(1)(c) applies in civil rights actions.

Congress did not provide Sections 1983 and 1985 of Title 42 of the *United States Code* with their own Statute of Limitations so that case law requires that the most appropriate period of limitations provided by state law must be applied. (*Board of Regents v Tomanio,* 446 US 478; *Johnson v Railway Express Agency,* 421 US 454, 462; *Swan v Board of Higher Education of the City of New York,* 319 F 2d 56, 59)

The plaintiff argues that the three-year Statute of Limitations in *CPLR* Sec. 214 (subd. 2) applies to this case since that section involves "an action to recover upon a liability, penalty or forfeiture created or imposed by statute". The *Staffen* case, *supra,* states that "Sec. 214 of the *CPLR* does not apply to statutes that regulate a substantive right or the procedure for its enforcement because such statutes do not create or impose a liability, penalty or forfeiture. Sections 1983 and 1985 of Title 42 of the *United*

States Code do not provide a substantive right but only furnish a remedy for the enforcement of Federal constitutional rights. (Citing cases)"

Reviewing the applicable provisions of the complaint, this Court determines that the gravamen or essence of the cause of action sounds in conversion. The applicable Statute of Limitations for a conversion action is one year.

This action with respect to the Section 1983, claims, is deemed to have been commenced when the Federal District Court action was commenced on April 2, 1982. The cause of action accrued on April 9, 1979, when the City took a tax deed. Accordingly, application of the one year and 90-day period of Section 50-1(1)(c) of the *General Municipal Law* bars this action.

It seems clear that the Section 1985 and 1986 claims were dismissed on the merits by the Second Circuit Court of Appeals and are barred by *res judicata*. In plaintiff's affidavit it is stated that "the inclusion of reference to the conspiracy causes of action under 42 U.S.C. Section 1985 and 1986 in a preliminary statement to the complaint was inadvertent. Plaintiff has requested no relief for conspiracy herein".

No cause of action has been stated under Section 1983 against defendants Metropolitan Development Foundation or Amlea. The plaintiff has failed to set forth allegations to demonstrate participation by these defendants in an alleged conspiracy or that the defendants performed acts to deprive plaintiff of civil rights. Such is necessary in seeking recovery under Section 1983. (*Buck v Board of Elections, City of New York*, 536 F. 2d 522 [2 Cir. 1976])

There is also nothing in the complaint about any participation by the defendants Metropolitan Development Foundation or

Amlea in Count One or Count Two concerning deprivation of property.

Subsequent connection of a person with a particular property involved is not sufficient to make that party liable to the plaintiff who had previously owned the property. (*Raitport v Provident Bank,* 451 F. Supp. 522 [E.D. Pa 1978]) This is also true in New York cases which have found no cause of action existing through subsequent connection with the property or subject of the suit. (*Newton v Livingston County Trust Co.,* 231 App. Div. 355 [4th Dept., 1931])

The motion to dismiss of defendants Metropolitan Development Corporation of Central New York, Inc. and Amlea (New York) Inc. is granted.

Submit an order in accordance with this decision.

Dated: May 21, 1984

/s/ Thomas J. Murphy

Thomas J. Murphy, J.S.C.

423 SOUTH SALINA STREET, INC., Plaintiff,

v.

CITY OF SYRACUSE, a Municipal Corporation; Robert Z. Srogi, Individually and as Commissioner of Assessment of the City of Syracuse; Frank L. Canino, Individually and as Commissioner of Finance of the City of Syracuse; Lee Alexander, Individually and as Mayor of the City of Syracuse; and Jacob Benderson, Individually and as Chairman, Assessment Board of Review of the City of Syracuse, Defendants.

No. 82-CV-319.

United States District Court,
N.D. New York.
May 6, 1983.

Former owner of real property brought action for damages against city and some of its major officials alleging that they had overassessed his property and then purposely delayed any and all efforts by owner to have overassessment corrected in the state court system. On defendants' motion to dismiss, the District Court, Munson, Chief Judge, held that state of New York provided a plain, adequate and complete remedy for challenge to its real property tax assessments, and thus principle of comity required dismissal of instant action.

Ordered accordingly.

Mousaw, Vigdor, Reeves, Heilbronner & Kroll, Rochester, N.Y., for plaintiff; Ruth Kennedy-Daise, James S. Grossman, Rochester, N.Y., of counsel.

David Garber, Corp. Counsel for the City of Syracuse, Anthony S. Bottar, Syracuse, N.Y., Jacob Benderson, Syracuse, for

defendants; Eric S. Benderson, Syracuse, N.Y., of counsel.

MEMORANDUM — DECISION AND ORDER

MUNSON, Chief Judge.

Plaintiff, the former owner of real property located in downtown Syracuse, New York, has brought this action for damages against the City of Syracuse and some of its major officials. According to plaintiff's complaint, defendants have been engaged in a longstanding conspiracy to deliberately overassess real property in the downtown area. In furtherance of this conspiracy, plaintiff alleges, defendants overassessed plaintiff's property and then purposefully delayed any and all efforts by plaintiffs to have the overassessment corrected in the state court system. Plaintiff's property was subsequently seized by the City for failure on the part of plaintiffs to pay their tax bills. A tax sale was conducted by the City and the City "bought" the property for the amount of unpaid taxes plus interest.

This action was brought by plaintiff under 42 U.S.C. § 1983 (Supp. IV 1980) to remedy what it perceived as a deprivation of its property without due process of law, without just compensation, and without equal protection of the laws. In addition, plaintiff alleges that the conspiratorial conduct of defendants violated 42 U.S.C. § 1985(3) (Supp. IV 1980), and that the failure of defendants to prevent such conspiracy when each defendant had the power to do so violated 42 U.S.C. § 1986 (Supp. V 1981). Jurisdiction is predicated upon 28 U.S.C. §§ 1331, 1343(3) (1976 & Supp. V 1981).

Presently before the Court is defendants' motion to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Defendants assert that plaintiff has failed to state a claim upon which relief can be granted. In addition, de-

fendants argue that the Tax Injunction Act, 28 U.S.C. § 1341 (1976), and principles of comity preclude this Court from entertaining plaintiff's action for damages. Defendant Benderson has also moved to dismiss the complaint on his own motion. Benderson moves to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), or in the alternative, moves for summary judgment pursuant to Fed.R. Civ.P. 56.

As noted by the courts of the State of New York, the City of Syracuse has been a "hotbed of tax litigation." *W.T. Grant Co. v. Srogi,* 52 N.Y.2d 496, 506, 420 N.E.2d 953, 956, 438 N.Y.S.2d 761, 764 (1981). The real property that is the subject of this litigation has already been subject to various real estate assessment review proceedings and the instant case appears to be an attempt to turn much of the attendant frustration from those proceedings into an award of damages. In order to place this proceeding in its proper perspective, the Court finds that a review of the state court proceedings is in order.

I

The property involved herein is located in the easterly half of the 400 block of South Salina Street, and is found in Block Number 116 of the Onondaga County Clerk's Index of Blocks. Originally owned by the University of Rochester, the property was leased to the W.T. Grant Company in 1944. The lease to Grants was for a term of 30 years, later extended to 1982 with an option to renew until 2043. Pursuant to the terms of the lease, Grants was required to pay annual rental charges in the amount of $77,322.32, plus all taxes, utilities and building maintenance expenses. The Grant tenancy ended in 1976 when Grants went bankrupt.

Following the Grant bankruptcy in 1976, the building was sold by the University of Rochester to plaintiff 423 South Salina Street, Inc. Plaintiff purchased the property for $25,000.00 and took it subject to the unpaid taxes for the year 1976. Accordingly, when one considers the total amount of taxes due together with interest and penalties, the full consideration given to the University of Rochester totaled $175,774.32. Plaintiff was of course free to pursue real estate assessment review procedures in an attempt to reduce the outstanding tax bills.

For the years 1964-78 inclusive, the City placed an assessed value on the property of $1,135,700.00. The City placed an assessed value on the property of $1,054,450.00 for the years 1979-80 inclusive. Having received what it considered to be outrageous real property assessments, Grants and later plaintiff instituted assessment review proceedings every year from 1964 through 1980.

[1, 2] Under New York law, persons challenging real property tax assessments must continue to pay their taxes during the pendency of assessment review procedures. *W.T. Grant Co. v. Srogi,* 52 N.Y.2d at 516-17, 420 N.E.2d at 962, 438 N.Y.S.2d at 770. *See also First United Methodist Church of Syracuse v. City of Syracuse,* 489 F.Supp. 185, 188 (N.D.N.Y. 1980). Mere institution of assessment review proceedings will not serve to stay either the collection of real property taxes or enforcement procedures by the taxing authority. *W.T. Grant Co. v. Srogi, id.* (citing N.Y. Real Prop. Tax Law § 704(3) (McKinney 1972); *People ex rel. Manhattan Ry. Co. v. Coleman,* 48 Hun. 602, 1 N.Y.S.2d 112; *People ex rel. New York El. Ry. Co. v. Coleman,* 48 Hun. 620, 1 N.Y.S.2d 551). While taxpayers who ultimately succeed in having their assessments reduced are given refunds of the amounts overpaid, this is small consolation considering the fact that the City

need only pay 3% interest on the overpayments. N.Y.Gen. Mun.Law § 3-a(1) (McKinney 1977 & Supp. 1982-83).[1]

As noted above, the City continually assessed the Grant property at $1,135,700.00. In December of 1972, Grants obtained a judgment against the City for $276,400.19 representing overassessments for the years 1964 through 1970. The city did not pay the judgment, but rather instituted an appeal to the Appellate Division.[2] By following this course, the City was able to take advantage of a statutory stay pending appeal. N.Y.Civ.Prac.Law § 5519(a)(1) (McKinney 1978). Despite the fact that the trial court found the proper assessments to be in the range of $632,100.00 to $742,000.00, the City continued to assess the property at the old rate of $1,135,700.00 for the years after 1970.

The next round of assessments to receive judicial review were those for the tax years 1971 through 1976. These proceedings were tried to the Honorable Henry A. Hudson beginning in May of 1976. While it was anticipated that the proof in the proceedings which covered upwards of 40 parcels of property would be

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[1] The New York Legislature has recently amended Section 3-a(1) of the General Municipal Law by providing for an increase in the interest rate payable by municipal corporations. This new rate of 9% goes into effect on the first day of the fiscal year following the enactment date of the new law. 1982 N.Y. Laws ch. 681, § 1. The enactment date of the new law was July 22, 1982. Accordingly, all payments of interest prior to the effective date of the new law will remain at the 3% level. Since plaintiff no longer has any assessment review proceedings pending, all references to interest payable will be to the older 3% rate.

[2] The City and Grants entered into negotiations to settle the 1972 judgment. Pursuant to an elaborate agreement worked out between the parties, Grants agreed to remain in business during the years 1975, 1976, and 1977. In return, the City would refund $240,000.00 of the $276,400.19 figure if certain contingencies occurred with respect to the City's appeals on the overassessments. With Grants having vacated the premises in 1976 due to its bankruptcy, it appears as though the City only paid $80,000.00 of the $240,000.00 settlement agreement. It further appears that the City did not review the assessment of the property pursuant to the terms of the agreement.

completed by September 1, 1976, delays caused largely by the City resulted in the proceedings running until the end of the year.

Justice Hudson rendered his decision in late February of 1978. In a judgment dated April 21, 1978, the City was ordered to refund $239,933.20 for overpayments on assessments for 1971 through 1975. Although Justice Hudson found overassessments for the tax year 1976 as well, no refund was ordered because neither Grants nor plaintiff paid any taxes during that year. The proper assessments ranged from $604,000.00 to $823,500.00 for the years 1971 through 1976. Once again, the City chose not to pay the refund and exercised its right to appeal.

During the course of the City's appeal of the 1971 through 1976 assessments, the City took a tax deed on plaintiff's property for non-payment of the 1976 taxes. The deed was recorded in the Onondaga County Clerk's Office on April 9, 1979. According to the terms of the deed, the City was the highest bidder on the property at a "tax sale" conducted on April 6, 1977. Thus, plaintiff was divested of its property as of April 9, 1979. Although Justice Hudson found that the City had overassessed the property for the tax year 1976 by over 100%, plaintiff did not pay taxes on either the full assessment of $1,135,700.00 or the reduced assessment of $604,000.00.[3]

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[3] The record is unclear whether plaintiff could have paid part of the 1976 taxes during the pendency of the City's appeal. Nevertheless, plaintiff was confronted with the well-established rule in New York that one complaining of overassessments must pay the tax and then sue for a refund. *W.T. Grant Co. v. Srogi*, 52 N.Y.2d at 516-17, 420 N.E.2d at 962, 438 N.Y.S.2d at 770. It is undisputed that plaintiff never paid any real property taxes with respect to its property. Thus, plaintiff paid $25,000.00 for the property in the hopes of receiving a favorable decision on the claim of overassessment. If such a decision was rendered, and, of course, upheld on appeal, then plaintiff would have paid the assessment. In this manner, plaintiff's speculation would have resulted in acquisition of the property at a "bargain price."

On May 17, 1979, the Honorable Richard Aronson enjoined the City from transferring title to the property to any third party pending a final appellate decision on the assessments.[4] The Appellate Division, Fourth Department, affirmed Justice Hudson's decision on the assessments and further reduced the total assessed values to the point where the refund due was $353,734.81; plus interest and costs, for the years 1971 through 1976. In addition, the Appellate Division affirmed Justice Aronson's grant of the injunction, finding that

> [w]e do not suggest that injunctive relief is available in ordinary tax review proceedings or even in unusual ones. We do hold, however, that this taxpayer has demonstrated a long and aggravated pattern of conduct by the City from which the taxpayer cannot reasonably protect itself or its property without injunctive relief.

W.T. Grant Co. v. Srogi, 71 A.D.2d 457, 475, 423 N.Y.S.2d 324, 336 (4th Dep't 1979), *rev'd* 52 N.Y.2d 496, 420 N.E.2d 953, 438 N.Y.S.2d 761 (1981).

On April 9, 1981, the New York Court of Appeals affirmed the Appellate Division's determination on the 1971 through 1976 assessments and entered final judgment in the amount of $353,734.81, plus interest and costs. With regard to the tax year 1976, the correct figure for assessed value was $380,000.00 with the correct figure for tax due being $42,997.00. Thus, the City had sought to collect $85,507.46 more in taxes from plaintiff than was finally determined to be due and owing.

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[4] Justice Aronson's injunction prohibited transfer until the pending assessment review proceedings for the years 1971 through 1976 had been completed. It should also be noted that the injunction covered a pending assessment review proceeding for the years 1977 through 1979. This later proceeding was ultimately dismissed in 1981 for failure to prosecute.

With regard to the injunction, the Court of Appeals reversed. Although the Court found that the City's conduct had been outrageous, plaintiff was not entitled to an injunction because it lacked equitable standing.

> The facts in the present case are quite compelling. As noted by the Appellate Division, taxpayers have been paying excessive taxes on the Grant property for over 12 years despite court rulings that the assessments were unlawful by reason of overvaluation. Substantial refunds were ordered on two occasions, but the city to date has repaid only a small portion of the taxes it has unlawfully collected. Such an aggravated pattern of misuse of the taxing power might have been sufficient to justify restraining the city from transferring title to the Grant property pending the final determination of the assessment proceedings. Nevertheless, the simple fact of the matter is that the party who obtained the injunction [423] South Salina Street, Inc., was not the one subjected to this unlawful conduct.

W.T. Grant Co. v. Srogi, 52 N.Y.2d at 518-19, 420 N.E.2d at 963, 438 N.Y.S.2d at 771-72. The Court of Appeals went on to observe that plaintiff

> purchased the property at the low price of $25,000 with the understanding that it would assume all tax liability then owing. These taxes were never paid, nor did [423] South Salina Street, Inc. pay taxes on the property for the next three years. Under these circumstances, while Grant may have been entitled to an injunction against the city, [423] South Salina Street, Inc., lacks equitable standing to assert the aggravated pattern of tax abuse to which its predecessor in interest was subject as the basis for injunctive relief. Therefore, we conclude that it was error to issue the injunction in this case.

Id. at 519, 420 N.E.2d at 961-64, 438 N.Y.S.2d at 772. Thus, it was just a case of the wrong plaintiff at the right time.

II

Defendants have raised the spectre of the Tax Injunction Act and principles of comity as a complete bar to this Court's jurisdiction. The Tax Injunction Act provides that:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1341. This legislation, according to the Supreme Court, "reflect[s] the fundamental principle of comity between federal courts and state governments that is essential to 'Our Federalism,' particularly in the area of state taxation." *Fair Assessment in Real Estate Ass'n, Inc. v. McNary,* 454 U.S. 100, 103, 102 S.Ct. 177, 179, 70 L.Ed.2d 271 (1981).

A

Even before the enactment of the Tax Injunction Act, the Supreme Court followed a policy of equitable restraint when dealing with state tax questions. This policy is best observed in *Matthews v. Rodgers,* 284 U.S. 521, 52 S.Ct. 217, 76 L.Ed. 447 (1932), where the Court reversed a grant of an injunction against the collection of a state tax. In *Matthews,* a three-judge district court enjoined the collection of a Mississippi tax on persons in the cotton industry. The Court found the injunction to be beyond the equitable powers of the district court. Since there was a "plain, adequate and complete" remedy in the state court system, *id.* at 526, 52 S.Ct. at 220, federal equity jurisdiction was lacking. The *Matthews* Court explained that

> [t]he scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunc-

> tion with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it.

Fair Assessment in Real Estate Ass'n, Inc. v. McNary, 454 U.S. at 108, 102 S.Ct. at 182 (citing *Matthews v. Rodgers,* 284 U.S. at 525, 52 S.Ct. at 219).

Following passage of the Tax Injunction Act in 1937,[5] the Supreme Court continued to recognize the comity principles at work in *Matthews v. Rodgers.* In *Great Lakes Dredge & Dock Co. v. Huffman,* 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943), plaintiffs sought a declaratory judgment that certain provisions in the Louisiana unemployment insurance tax laws were unconstitutional as applied to them. Relying on *Matthews v. Rodgers,* the Court in *Great Lakes* refused to allow the entry of such a declaratory judgment due to considerations of federalism and comity. "[W]e are of the opinion that those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure." *Id.* 319 U.S. at 301, 63 S.Ct. at 1074.

B

In *Fair Assessment in Real Estate Ass'n, Inc. v. McNary,* the Supreme Court was presented with a conflict between the above-mentioned principles of restraint and the broad remedial principle of 42 U.S.C. § 1983. While the Tax Injunction Act was a direct restraint on federal court jurisdiction, 42 U.S.C. § 1983 expressed the Congressional intent that there be immediate availability of a federal forum for persons whose constitutional or federal rights had been abridged by any state. To resolve this

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[5] Act of August 21, 1937, 50 Stat. 738.

conflict, the Court turned to the facts of the *Fair Assessment* case and compared them with the policies underlying each of the statutes.

Petitioners in *Fair Assessment* were landowners and a nonprofit corporation formed by taxpayers to promote equitable real property assessments in St. Louis County and throughout the State of Missouri. According to their complaint, St. Louis County officials assessed properties with new improvements at 33.3% of their current market value while assessing similar properties without new improvements at 22% of current market value. 454 U.S. at 106, 102 S.Ct. at 181. In addition, petitioners claimed that property owners who successfully appeal their real property tax assessments are targeted for reassessment the following year. *Id.* Although petitioner Cassilly, the landowner, sought limited relief in the Missouri State court system, his efforts proved unsuccessful. Accordingly, he filed suit in the federal district court seeking actual damages in the amount of overassessments as well as punitive damages from each of the defendant real property tax officials. Petitioner Fair Assessment in Real Estate Ass'n, Inc. sought damages in the amount of expenses incurred in promoting its cause.

[3] The Court found that resort to the Tax Injunction Act was not required. According to the majority, principles of comity bar the award of damages in a federal court under 42 U.S.C. § 1983 for the alleged unconstitutional administration of state tax systems. Where state remedies are "plain, adequate and complete,"[6]

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[6] In footnote 8, 454 U.S. at 116, 102 S.Ct. at 186, the Court observed that the phrase "plain, adequate and complete" found in the *Matthews* and *Great Lakes* decisions should be given the same meaning as the phrase "plain, speedy and efficient" found in the Tax Injunction Act. For a determination as to the effectiveness of state remedies, the federal court must, of course, look to the applicable state law.

the door to the federal courts will be closed to the state taxpayer. 454 U.S. at 116, 102 S.Ct. at 186. Of particular import to the instant case is the following passage.

> Petitioners will not recover damages under [42 U.S.C.] § 1983 unless a district court first determines that respondents' administration of the county tax system violated petitioners' constitutional rights. In effect, the district court must first enter a declaratory judgment like that barred in *Great Lakes*. We are convinced that such a determination would be fully as intrusive as equitable actions that are barred by principles of comity [footnote omitted]. Moreover, the intrusiveness of such [42 U.S.C.] § 1983 actions would be exacerbated by the nonexhaustion doctrine of *Monroe v. Pape*, 365 U.S. 167 [81 S.Ct. 473, 5 L.Ed.2d 492] (1961). Taxpayers such as petitioners would be able to invoke federal judgments without first permitting the State to rectify any alleged impropriety.

Id. at 113-14, 102 S.Ct. at 184-85. Therefore, the Court must determine whether plaintiff may protect its federal rights by resort to "plain, adequate and complete" state procedures. If such a state remedy is available, then plaintiff's complaint must be dismissed on the grounds of comity.[7]

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[7] This result is also consistent with the past law in this Circuit. For example, in *Evangelical Catholic Communion, Inc. v. Thomas*, 373 F.Supp. 1342 (D.Vt. 1973), *aff'd without opinion*, 493 F.2d 1397 (2d Cir. 1974), the district court dismissed a similar action for damages, finding that a prerequisite for the award of damages would be the declaration that plaintiff's rights had been violated. 373 F.Supp at 1344. While *Evangelical Catholic Communion, Inc. v. Thomas* was decided on the basis of the Tax Injunction Act, it was cited with approval in *Fair Assessment*, 454 U.S at 113-14 n.7, 102 S.Ct. at 184-85 n.7. *See also Wells v. Malloy*, 510 F.2d 74 (2d Cir. 1975); *Hickman v. Wujick*, 488 F.2d 875 (2d Cir. 1973); *American Commuters Assn. Inc. v. Levitt*, 405 F.2d 1148 (2d Cir. 1969).

III

Plaintiff seeks to avoid the harshness of the rule expressed in *Fair Assessment* by advancing the position that this Court need not make a determination or judgment about the constitutionality of defendants' conduct. According to plaintiff, the New York Court of Appeals has explicitly held that defendants abused their taxing authority and that this finding is binding on this Court by virtue of 28 U.S.C. § 1738 (1976). On the other hand, defendants seek to make the identical argument by asserting that the New York Court of Appeals has explicitly held that plaintiff was not the victim of defendants' unlawful conduct.

[4] The principles of res judicata (claim preclusion) and collateral estoppel (issue preclusion) are fully applicable to actions brought under the federal civil rights statutes. *Allen v. McCurry,* 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980); *Gargiul v. Tompkins,* 704 F.2d 661, 665 (2d Cir. 1983). Res judicata serves to bar relitigation of issues actually raised and decided as well as those issues that could have been, but were not, raised and decided in that action. *Gargiul v. Tompkins,* 704 F.2d at 665. There must have been, of course, a final judgment on the merits for res judicata to apply. As to the invocation of collateral estoppel, issues that have already been litigated and determined adversely to a party in a prior action may not be relitigated where such adverse determination was necessary to the judgment in the action. *Id.*

In the present case, the parties seek to invoke res judicata and/or collateral estoppel with respect to two specific findings by the New York Court of Appeals: (1) that defendants abused their taxing power with respect to real property assessments on plaintiff's property for the years 1964-76; and (2) that plaintiff was not the one subjected to defendants' unlawful conduct. *W.T. Grant Co. v. Srogi,* 52 N.Y.2d at 518-19, 420 N.E.2d at 963, 438 N.Y.S.2d at

771-72. Clearly, each party seeks to preclude the other from relitigating only that issue which helps his respective case.

[5] The Court of Appeals restricted its ruling to the propriety of the 1971-76 assessments. No finding was made on the then-pending 1977-79 assessments. Thus, there has been no court determination, either state or federal, about the propriety of the real property assessments during the time when plaintiff had an interest in the property. Accordingly, res judicata or collateral estoppel would not aid plaintiff or defendant in the instant case.

[6] As to the Court of Appeals' finding that plaintiff was not damaged by defendants' unlawful conduct, such finding has no bearing on the instant case due to its interlocutory character. The Court of Appeals made this reference to plaintiff's equitable standing in the context of a preliminary injunction. No final decision on the question of whether plaintiff was ever injured by defendants during the time when it had an interest in the property was ever entered. Thus, as with the ruling on the assessments, res judicata and collateral estoppel do not serve to bar relitigation in the instant case. Therefore, the Court is faced with the identical situation presented in the *Fair Assessment* case: a taxpayer's suit for damages under 42 U.S.C. § 1983 based on the validity of a state taxing system. Moreover, as in *Fair Assessment,* there has been no finding that plaintiff has been injured by defendants' conduct.

IV

In order to determine the adequacy of plaintiff's remedies under New York law, the Court must first turn its attention to the recent Supreme Court decision in *Rosewell v. LaSalle Nat'l Bank,* 450 U.S. 503, 101 S.Ct. 1221, 67 L.Ed.2d 464 (1981). In *Rosewell,* the Court explained that state remedies are to be measured in a "procedural" rather than a substantive context. *Id.* at

512, 101 S.Ct. at 1228; *Lamont v. Tully,* 517 F.Supp. 462, 464 (N.D.N.Y.), *vacated on other grounds,* 92 F.R.D. 462 (N.D.N.Y. 1981). The procedures available under Illinois law in the *Rosewell* case were determined to be adequate because taxpayers were provided with a " 'full hearing and judicial determination' at which [they] may raise any and all constitutional objections to the tax." 450 U.S. at 514, 101 S.Ct. at 1229. Appellate review was available through the Illinois State court system with ultimate review in the Supreme Court available under 28 U.S.C. § 1257 (1976). Although state court review normally takes two years time after which the state refunded overpayments without interest, the Supreme Court found such procedure to be "speedy" within the meaning of the Tax Injunction Act. *Id.* at 520-21, 101 S.Ct. at 1232-33.

Under New York law, the normal method for challenging the validity of real property assessments is through the procedures in Article 7 of the Real Property Tax Law. N.Y. Real Prop. Tax Law, Art. 7 (McKinney 1972 & Supp. 1982-83); *First United Methodist Church of Syracuse v. City of Syracuse,* 489 F.Supp. 185, 188 (N.D.N.Y. 1980). The facts of the present case suggest, however, that this procedure is neither "plain, adequate and complete" within the meaning of the *Matthews, Great Lakes,* or *Fair Assessment* decisions, nor "plain, speedy and efficient" within the meaning of the Tax Injunction Act.[8] Through the use of New York's statutory stay provision, the City has been able to drag assessment review proceedings well beyond the so-called two year maximum time period allegedly set down by the Court in *Rosewell v. LaSalle Nat'l Bank. See Friarton Estates Corp. v. City of New York,* 681 F.2d 150, 157-58 (2d Cir. 1982). Thus, the Court

[8] It must, of course, be remembered that plaintiff never followed through with its Article 7 assessment review procedures. *See* note 4 *supra.* At the time of their dismissal, four years had elapsed since the inception of the first year's review proceeding.

must determine whether other procedures available under New York law could adequately protect plaintiff's federal rights. *Fair Assessment,* 454 U.S. at 116, 102 S.Ct. at 186.

[7] As the Supreme Court noted in *Fair Assessment,* 454 U.S. at 116-17, 102 S.Ct. at 186, the availability of a state forum in which to pursue an action under 42 U.S.C. § 1983 strongly supports the withholding of federal jurisdiction. Here, it is undisputed that the courts of the State of New York will entertain such civil rights actions. Moreover, as this Court observed in the *First United Methodist Church of Syracuse* case, 489 F.Supp. at 188, taxpayers complaining of unlawful or discriminatory real property tax assessments may avail themselves of New York's declaratory judgment procedure. N.Y.Civ.Prac.Law § 3001 (McKinney 1974). In addition, New York practice provides for an expedited review of official action through what has come to be known as an "Article 78 proceeding." N.Y.Civ.Prac.Law, Art. 78 (McKinney 1981 & Supp. 1982-83). *See Tully v. Griffin,* 429 U.S. 68, 97 S.Ct. 219, 50 L.Ed.2d 227 (1976). Thus, it appears as though New York offers an entire range of proceedings in which taxpayers may challenge real property tax assessments.

In opposition plaintiff argues that these procedures all have short statutes of limitations and that dismissal of this action will result in plaintiff being left without any method of redress. However, the fact that the statute of limitations may have expired is irrelevant to the issue of whether plaintiff has an adequate state remedy. Instructive in this regard is the case of *Henry v. Metropolitan Dade County,* 329 F.2d 780 (5th Cir. 1964), where the court stated that

> [t]he existence of a remedy in the State court effectively ousts the federal court of jurisdiction . . . . The expiration of time in which the state suit might have been brought does not result in the destruction of the plain and simple remedy

> principle specified in the [Tax Injunction Act]. To hold otherwise would allow any disgruntled taxpayer to simply wait until the statute of limitations had run in the state courts and then bring suit in the federal court.

Id. at 781. *See also Town of Ball v. Rapides Parish Police Jury,* 597 F.2d 43, 45-46 (5th Cir. 1979); *Aluminum Co. of Am. v. Department of Treasury of State of Michigan,* 522 F.2d 1120, 1125 (6th Cir. 1975); *Bonin v. Gannon,* 494 F.Supp. 78, 81 (M.D.Pa. 1980); *Group Assisting Sewer Proposal-Ansonia v. City of Ansonia,* 448 F.Supp. 45, 47 (D.Conn. 1978); *Klotz v. Consolidated Edison Co. of New York,* 386 F.Supp. 577, 587 (S.D.N.Y. 1974).

[8] Accordingly, this Court finds that the State of New York provides a "plain, adequate and complete" remedy for challenges to its real property tax assessments and, therefore, principles of comity require dismissal of the instant action. This result is also consistent with the mandate of the Tax Injunction Act. Although plaintiff asserts that the decision in *Staffen v. City of Rochester,* 80 A.D.2d 16, 437 N.Y.S.2d 821 (4th Dep't 1981), precludes it from filing a civil rights action in the state courts, this Court notes that *Staffen* may not be the last word on the statute of limitations for actions brought under 42 U.S.C. § 1983. Just three months after the decision in *Staffen,* the United States Court of Appeals for the Second Circuit decided *Pauk v. Board of Trustees of City Univ. of New York,* 654 F.2d 856 (2d Cir. 1981).

In *Pauk,* the court made a detailed examination of the scope and effect of 42 U.S.C. § 1983 and compared this analysis to the various New York statutes of limitations. The *Pauk* court concluded that the three year statute of limitations applied to actions brought under 42 U.S.C. § 1983 rather than the one year and ninety day statute of limitations expressed in *Staffen.* In view of the *Pauk* decision, the courts of the State of New York, and more

particularly the Fourth Department, may reconsider the *Staffen* decision. Thus, it cannot be said that plaintiff is completely foreclosed from any relief in the New York State court system.

V

[9] With regard to plaintiff's allegation of a conspiracy, the Court agrees with defendants that plaintiff has failed to meet the somewhat stringent pleading requirements of this Circuit. Plaintiff has failed to put forward any specific facts concerning the alleged conspiracy among defendants, and its complaint contains only the barest of allegations supporting such a claim. With such "vague," "conclusory" and "general" allegations of a conspiracy to deprive plaintiff of its civil rights, *Contemporary Mission, Inc. v United States Postal Service,* 648 F.2d 97, 107 (2d Cir. 1981) (citing *Ostrer v. Aronwald,* 567 F.2d 551, 553 (2d Cir. 1977), plaintiff's complaint cannot withstand a motion to dismiss. As to plaintiff's claim under 42 U.S.C. § 1986, it follows that having proved no conspiracy under 42 U.S.C. § 1985, plaintiff cannot succeed on its claim that defendants could have prevented such conspiracy. *Powell v. Kopman,* 511 F.Supp. 700, 704 (S.D.N.Y. 1981); *Slegeski v. Ilg,* 395 F.Supp. 1253, 1255-56 (D.Conn. 1975).

VI

In conclusion, the Court finds that the State of New York provides its citizens with a "plain, adequate and complete" remedy for challenging real property tax assessments. Accordingly, principles of comity as well as the Tax Injunction Act preclude the instant suit for damages in federal district court. In addition, plaintiff has failed to prove its allegations of a conspiracy among

defendants. Finally, absent proof of a conspiracy, plaintiff may not succeed on its claim that defendants failed to prevent such conspiracy.[9] Therefore, it is

ORDERED, that defendants' motion to dismiss the complaint is hereby granted.

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[9] In view of this Court's ruling on defendants' motion to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6), there is no need to reach the motion made on behalf of defendant Benderson in his individual capacity.

423 SOUTH SALINA STREET, INC., Appellant,

v.

The CITY OF SYRACUSE, a Municipal Corporation, Robert Srogi, Individually and as Commissioner of Assessment of the City of Syracuse, Frank L. Canino, Individually and as Commissioner of Finance of the City of Syracuse, Lee Alexander, Individually and as Mayor of the City of Syracuse, and Jacob Benderson, Individually and as Chairman, Assessment Board of Review of the City of Syracuse, Appellees.

No. 183, Docket 83-7432.

United States Court of Appeals, Second Circuit.

Argued Oct. 24, 1983.

Decided Dec. 14, 1983.

Purchaser of allegedly overassessed property brought federal civil rights suit challenging city's seizure of the property after purchaser failed to pay outstanding tax liability on it. The United States District Court for the Northern District of New York, Howard G. Munson, Chief Judge, dismissed the complaint, 566 F.Supp. 484, and plaintiff appealed. The Court of Appeals held that: (1) priniciples of comity barred award of damages under civil rights statute, and (2) federal statute prohibiting conspiracies to deprive others of constitutional rights did not reach alleged conspiracy involving the tax assessments.

Affirmed.

James S. Grossman, Rochester, N.Y. (Ruth Kennedy-Daise, Mousaw, Vigdor, Reeves, Heilbronner & Kroll, Rochester, N.Y., of counsel), for appellant.

James L. Gelormini, First Asst. Corp. Counsel, Syracuse, N.Y. (David M. Garber, Corporation Counsel, Syracuse, N.Y., of counsel), for appellees City of Syracuse, Srogi, Canino, and Alexander.

Eric S. Benderson, Syracuse, N.Y. (Jacob Benderson, Syracuse, N.Y., Judith Kunzman Benderson, Potomac, Md., of counsel), for appellee Benderson.

Before OAKES and KEARSE, Circuit Judges, and WYZANSKI, District Judge.*

PER CURIAM:

According to the New York courts, the City of Syracuse has engaged in "an aggravated pattern of misuse of the taxing power"[1] by overassessing property year after year despite court rulings that such overassessments were unlawful. This "long and aggravated pattern of conduct"[2] has enabled the City to have use of the overassessed amounts at the expense of taxpayers who are

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* Of the District of Massachusetts, sitting by designation.

[1] *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 518-19, 420 N.E.2d 953, 963, 438 N.Y.S.2d 761, 772 (1981) (denying injunction to present appellant on basis that it lacks equitable standing to assert aggravated pattern of tax abuse against its predecessor in title).

[2] *W.T. Grant Co. v. Srogi*, 71 A.D.2d 457, 574, 423 N.Y.S.2d 324, 336 (1979), *aff'd in relevant part*, 52 N.Y.2d 496, 420 N.E.2d 953, 438 N.Y.S.2d 761 (1981).

left to fight prolonged administrative and judicial battles, and who recover a mere 3% surcharge upon proving overassessments.[3]

Appellant is a purchaser of one such overassessed piece of property, having bought it at a low price with the understanding that the outstanding tax liability would be assumed. Appellant did not, however, pay that liability, nor did it pay the taxes for the following three years. As a result, the City seized the property and ultimately "bought it" for the amount of unpaid taxes plus interest.

[1] Appellant brought a federal civil rights suit challenging these actions. It alleged violations of 42 U.S.C. § 1983 (Supp. 1981) for deprivation of its property without due process or just compensation and without equal protection of the laws. In addition, it made claims under 42 U.S.C. §§ 1985(3) and 1986 (1976 & Supp. 1981), alleging that the City and some of its major officials conspired to violate appellant's civil rights and failed to prevent the operation of such a conspiracy when they had the power to do so. The United States District Court for the Northern District of New York, Howard G. Munson, Chief Judge, dismissed the complaint in a well-reasoned opinion. The court held that appellant's Section 1983 claim was barred by *Fair Assessment in Real Estate Association, Inc. v. McNary,* 454 U.S. 100, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981) (principles of comity bar award of damages in federal court under Section 1983 for alleged unconstitutional administration of state tax assessments), and that the allegations

[3] N.Y.Gen.Mun. Law § 3-a(1) (McKinney 1977). The New York legislature has subsequently increased the interest rate to 9% as of July 22, 1982. 1982 N.Y.Laws ch. 681 § 1.

of conspiracy were " 'vague,' 'conclusory,' and 'general,' " and thus insufficient to state claims under Sections 1985(3) and 1986 as interpreted by this circuit.[4]

We agree fully with the district court's treatment of appellant's Section 1983 claims, in particular with its analysis of *McNary* and of the adequacy of appellant's remedies under New York law. 566 F.Supp. at 488-93. Thus, with respect to these claims, we affirm on the opinion below.

[2] We also affirm the dismissal of appellant's claims under Section 1985(3), but we do so on a ground different from that relied on by the district court. *United Brotherhood of Carpenters and Joiners v. Scott,* ____U.S.____, 103 S.Ct. 3352, 3353, 77 L.Ed.2d 1049 (1983), decided since the decision below was handed down, held quite explicitly that Section 1985(3) does not "reach conspiracies motivated by bias towards others on account of their *economic* views, status, or activities." *Id.* at 3360 (emphasis in original) (nonunion construction company and employees had no action under Section 1985(3) against a regional trade council, twenty-five local unions, and various individuals for damages occurring from assault on employees and destruction of construction equipment at job site). If anything, this case more obviously involves an economic class than *United Brotherhood.* In *United Brotherhood* the victims were attacked because of their membership in a specific class of nonunion employers/employees, while so far as appears here, if a class of taxpayers is

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[4] *423 South Salina St. v. City of Syracuse,* 566 F.Supp 484, 493 (N.D.N.Y. 1983) (citing *Contemporary Mission, Inc. v. United States Postal Service,* 648 F.2d 97, 107 (2d Cir. 1981); *Ostrer v. Aronwald,* 567 F.2d 551, 553 (2d Cir. 1977)).

involved at all,[5] it is more purely an economic class, i.e., downtown property holders. Because the appellant has not made out a claim of conspiracy within the meaning of Section 1985(3), it follows that his claim against the appellees under Section 1986, for failure to prevent such conspiracy, must also be dismissed. 42 U.S.C. § 1986 (1976); *Powell v. Kopman,* 511 F.Supp. 700, 704 (S.D.N.Y. 1981); *Slegeski v. Ilg,* 395 F.Supp. 1253, 1255-56 (D.Conn. 1975).

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[5] Paragraph 55 of the complaint makes allegations as to other downtown property owners. The Appellate Division did suggest that downtown property owners were affected as a class:

> It is not difficult to sort out the considerations at work here. The City's constitutional debt limit and the amount of important financial aid it receives are computed by the total assessed value of the real property in the City. An important segment of any municipal assessment roll is the commercial properties of its downtown shopping area. These properties not only contribute high values to the assessment roll, but downtown property owners represent a relatively innocuous part of the City constituency. Thus, there is much to win and little to risk by keeping downtown assessments high.

W.T. Grant Co. v. Srogi, 71 A.D.2d at 474, 423 N.Y.S.2d at 335, *aff'd in relevant part,* 52 N.Y.2d 496, 420 N.E.2d 953, 438 N.Y.S.2d 761 (1981). But appellant also suggests that the City especially wanted its property because it is a key to a large development planned by the City, an allegation somewhat inconsistent with the claim of a conspiracy against the class of downtown property holders.

Judgment Appealed From

COURT OF APPEALS
STATE OF NEW YORK
The Hon. Sol Wachtler, Chief Judge, Presiding

No. 399

4

423 South Salina Street, Inc.,

Appellant,

v.

City of Syracuse, &c., et al.,

Respondents.

The appellant in the above entitled appeal appeared by Mousaw, Vigdor, Reeves, Heilbronner and Kroll, Esqs.; the respondents appeared by Hon. David M. Garber, Corporation Counsel, City of Syracuse; and Hancock and Estabrook, Esqs.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs. Opinion by Judge Meyer. Chief Judge Wachtler and Judges Simons, Alexander and Titone concur. Judges Kaye and Hancock took no part.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Onondaga County there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/

Donald M. Sheraw, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, November 20, 1986.

STATE OF NEW YORK
COURT OF APPEALS

423 SOUTH SALINA STREET, INC., APPELLANT,

V.

CITY OF SYRACUSE
METROPOLITAN DEVELOPMENT FOUNDATION OF CENTRAL NEW YORK, INC.
AND AMLEA (NEW YORK), INC., APPELLEES

NO. 399

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that 423 South Salina Street, Inc., the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the court of Appeals of the State of New York, affirming the dismissal of the complaint against the City of Syracuse by reason of Appellant's failure to file a Notice of Claim pursuant to N.Y. General Municipal Law §§50-e and 50-i. Said judgment was entered in this action on November 20, 1986.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

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Filed: New York State Court of Appeals on January 20, 1987

Supreme Court, U.S.
FILED
MAR 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1350

IN THE

Supreme Court of the United States

October Term, 1986

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423 SOUTH SALINA STREET, INC.,
Appellant,

against

CITY OF SYRACUSE, METROPOLITAN DEVELOPMENT FOUNDATION OF CENTRAL NEW YORK, INC., and AMLEA (NEW YORK), INC.,
Appellees.

MOTION TO DISMISS

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Questions Presented.

Does 42 U.S.C. §1988 subject civil rights money damage claims to a New York statute requiring a notice of tort claim prior to suit?

Does an intentional tort statute of limitations govern §1983 actions in light of *Wilson v. Garcia,* 271 U.S. 261 or, as the Court below held, a statute of limitations for negligence actions?

Does appellant state a "taking" claim under 42 U.S.C. §1983 because the City acquired its property for admitted tax delinquency?

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Motion to Dismiss or Affirm.

The Appellee City of Syracuse moves the Court pursuant to Rule 16 to dismiss the appeal herein, or in the alternative to affirm, on the following grounds:

I. The appeal is not within this Court's jurisdiction. No appeal lies to the Court under 28 U.S.C. §1257(2) because in this case there is not drawn into question the validity of a state statute on the ground of it being repugnant to the Constitution or laws of the United States.

II. A Constitutional question was not raised in the state courts below.

III. It is not necessary to reach the federal question.

IV. The appeal does not present a substantial federal question.

V. The appeal was not taken in conformity with the Court's rules.

VI. Certiorari should be denied.

The argument which follows deals with these grounds in more detail and in the order shown above. In the event the appeal is dismissed, appellee requests that certiorari be denied for the reasons set forth herein.

Statement of the Case.

a) Facts regarding the merits.

The relevant facts are undisputed and briefly stated. The appellant, 423 South Salina Street, Inc., was incorporated in New York State on September 15, 1976. Eleven days later on September 26, 1976, it acquired premises commonly known as 425-27 South Salina Street, Syracuse, New York ("the Property") (5d ¶7).* Appellant acquired the Property for $25,000 subject to the first two quarters of unpaid 1976 real estate taxes.

Appellant never paid the 1976 taxes on the Property or the 1977, 1978 or 1979 taxes. On April 9, 1979, a tax deed to the Property was issued to appellee, the City of Syracuse, New York, by reason of appellant's failure to pay the 1976 taxes. It should be noted that appellant was a corporation which was dissolved in 1980 for failure to pay state franchise taxes (4d ¶2).

The appellant has characterized its "taking" claim as resting on the City's repeated overtaxing of the Property so "as to completely destroy the value of the Property" and the fact that the City acquired the Property by reason of Appellant's admitted tax delinquency (Jurisdictional Statement, p. 9).

With respect to appellant's "destruction of value" claim, appellant conceded below that the Property's value was *already* destroyed when it bought the Property because of acts which pre-dated its acquisition and corporate existence. In its brief to the New York Court of Appeals, the appellant claimed that the City's alleged policy of overtaxing directed to its predecessor in title (the Univer-

*Page numbers in parentheses refer to pages of appellee's appendix unless otherwise stated.

sity of Rochester) "destroyed the value of the Property and explains the University of Rochester's willingness to dispose of its interest therein * * * for $25,000" (p. 15, Appellant's Brief to N.Y. Court of Appeals). Thus, in 1976, appellant purchased for $25,000 property whose 1976 value was judicially fixed by the New York Courts at $950,000. *W. T. Grant v. Srogi,* 52 NY2d 496, 509 n.1.

According to appellant, the Property's value was *already* destroyed when appellant purchased it from the former owner, the University of Rochester. This concession in appellant's brief is significant for two reasons: First, it shows that appellant did not purchase property which *later* lost its value, but rather purchased property which had *already* lost its value. Secondly, it shows that appellant is really seeking to sue for alleged wrongs suffered by appellant's predecessors (W. T. Grant and the University of Rochester) and not for alleged wrongs done to appellant.

Appellant was willing to purchase property already depreciated in value because appellant was incorporated to speculate in real property. The New York Court of Appeals and the United States District Court for the Northern District of New York have stated the following with respect to this appellant:

> [The appellant] acquired the Grant property in late 1976 with full awareness of its tax history. Indeed [the appellant] purchased the property at the low price of $25,000.00 with the understanding that it would assume all tax liability then owing. These taxes were never paid nor did [the appellant] pay taxes on the property for the next three years. *W. T. Grant v. Srogi,* 52 NY2d 496, 518 (1981).

> [Appellant] paid $25,000.00 for the Property in the hopes of receiving a favorable decision on the claim of overassessment. If such a decision was rendered, and, of course, upheld on appeal, then appellant would have paid the assessment. In this manner, appellant's speculation would have resulted in acquisition of the property at a "bargain price".
>
> *423 S. Salina St. v. City of Syracuse,* 566 F.Supp 484, 487 n3 (Jurisdictional Statement P. A-35 n.3).

The Federal District Court termed appellant's acquisition a "speculation" that could have resulted in acquiring the Property for a "bargain price" for good reason. As previously noted, New York Courts fixed the Property's value at $950,000.00 for the 1976 tax year and appellant only paid "the low price of $25,000.00" for the Property subject to 1976 taxes. *W. T. Grant v. Srogi,* 52 NY2d 496, 509 n.1 (1981).

Appellant's deliberate and intentional refusal to pay the 1976 taxes or taxes for any other years was a calculated strategy to fix its maximum loss at the $25,000.00 purchase price. In fact Appellant refused to pay the 1976 taxes as reduced, from $128,504 to $42,997, by the Appellate Division of New York's Supreme Court. As the District Court noted above, by gambling on the outcome of the pending assessment review proceedings and by not paying taxes (either as originally assessed or reduced by courts), appellant sought to pyramid the value of its investment without risking any more than its initial stake—i.e., its $25,000.00 purchase price. Appellant was aware that the risk in such a strategy was that the City would acquire the property for the 1976 tax delinquency. This the City did by the tax deed filed April 9, 1979.

Appellant engaged in real estate speculation and lost. Appellant now attempts to litigate its way to a profit. Appellant's theory seems to be that it can gamble and take risks with tax delinquent property, but if the outcome is not favorable, resort can be made to the federal civil rights statutes.

Appellant has abandoned any interest in reclaiming the Property for to do so would require it to pay the taxes it owes. Appellant does not challenge the finding and holding of the Court below that appellant "does not * * * having standing to obtain equitable relief in the form of vacatur of the tax deed taken by the City * * * [appellant] has offered no explanation for its failure to pay the taxes found due * * * Moreover, [appellant] has made no offer in this proceeding to pay taxes due * * *" (Jurisdictional Statement, p. A-6).

By reason of the foregoing facts, this case presents a corporation, dissolved six years ago for failure to pay state franchise taxes, which purchased tax delinquent property valued by Courts at $950,000 for $25,000; which did not, and does not, intend to pay any taxes due; which does not now seek return of the property by setting aside the tax deed vesting title in the appellee, City of Syracuse; but which, nonetheless, wishes to use the Civil Rights Act to seek requested damages of $12 million for a $25,000 investment allegedly lost (24d).

The facts have been set forth in some detail because appellee respectfully submits that if the case is set for argument the notice of claim issue sought to be reviewed by appellant need not be reached since there is a failure to state a claim and because the complaint is barred by the Statute of Limitations (Point III herein, p. 10).

b) Facts regarding notice of claim.

The facts particularly relevant to the notice of claim issue reveal that appellant was always represented by counsel and had ample opportunity to comply with New York's notice of claim requirements. The City acquired appellant's Property by filling a tax deed pursuant to state law on April 9, 1979. Within 24 days however, appellant, represented by counsel, applied to state courts for a preliminary injunction restraining the City from transferring its interest in the Property (12d ¶28). Appellant was aware that the tax deed was filed and was represented by counsel but chose not to file a notice of claim for damages.

As the Court below noted, appellant had three years from the April 9, 1979 tax deed filing to seek permission to file its notice of claim, even if it failed to file the notice of claim within the initial 90 day period (Jurisdictional Statement, p. A-18-19). That three year period expired on April 9, 1982. On April 2, 1982, appellant's counsel filed a federal civil rights action in federal district court. Again, no notice of claim was filed or application made to serve a late notice of claim. Moreover, a year earlier—on April 2, 1981—the New York Court of Appeals finally dissolved the previously issued preliminary injunction restraining the City from transferring its interest in the Property acquired by the tax deed (13d ¶32). Thus, appellant and his counsel had adequate opportunity and knowledge of the facts but chose not to file a notice of claim.

Appellant was always represented by counsel and was aware of the alleged adverse actions being taken against it, and yet failed to file a notice of claim. Appellant was not reticent about filing civil rights complaints or applications for equitable relief. As the Court below aptly noted "the present plaintiff slept on both the right to give the re-

quired warning of impending suit to the municipality and the right to obtain leave of court, at any time during the full three year limitation period, to give notice late" (Jurisdictional Statement A-19).

POINT I.

The appeal is not within the Court's jurisdiction.

Appellant purports to invoke the Court's jurisdiction pursuant to 28 U.S.C. §1257(2) because the New York Court of Appeals allegedly upheld the constitutionality of §50-i of the New York General Municipal Law.

The New York Court of Appeals did not hold §50-i of the New York General Municipal Law constitutional or even address the issue of that statute's constitutionality. Rather the Court below analyzed the question of whether the notice of claim requirements of that statute should be applied to a §1983 action, as a question "involving * * * [the] construction of 42 U.S.C. §1988" (Jurisdictional Statement, p. 13, C[1]). Thus, the issue was one of statutory construction not constitutionality. The Court below relied on this Court's precedent dealing with the issue of whether a state procedural rule is to be borrowed pursuant to 42 U.S.C. §1988 and determined that §1988 required the application of the notice of tort claim requirements of §50-i of the New York General Municipal Law to civil rights damage actions.

As shown in Point II herein, p. 8, appellant itself urged the Court below to rule that 42 U.S.C. §1988 prohibited borrowing the state statute. Appellant below did not challenge the state statute itself as unconstitutional either facially or as applied. In fact, appellant concedes as much in its Jurisdictional Statement where it attacks the holding below is violating "the first principle of 42 U.S.C. §1988

* * * Section 1988 would not permit borrowing [§50-i of the New York General Municipal Law]" (p. 16).

Accordingly, since the constitutionality of a state statute was not addressed by the court below or raised by appellant, the Court does not have jurisdiction over the appeal. *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969).

POINT II.

The appellant did not raise a constitutional question below.

Appellant never contended below that the notice of claim provisions of New York General Municipal Law §50-i were unconstitutional. Rather, appellant claimed that the question was a federal one to be governed by an interpretation of 42 U.S.C. §1988. Appellant argued below that either the notice of claim provisions were inappropriate to be borrowed pursuant to 42 U.S.C. §1988 or that the language of the state statute did not reach its claim. Appellee argued otherwise. The Court below did not hold §50-i constitutional against a constitutional attack because appellant never claimed that New York General Municipal Law §50-i was unconstitutional.

A review of appellant's submissions to all three state courts below shows appellant relied on an interpretation of 42 U.S.C. §1988, or a narrow reading of §50-i of New York General Municipal Law, and not on a constitutional attack.

Appellant's response to the initial motion to dismiss made to the New York State Supreme Court (Special Term) was that its claim was for an "injury to property" and thus not covered by §50-i of New York General Municipal Law. In appellant's view that statute only applied

to claims for "damage to property" (2a). Appellant also argued that the statute was not intended to apply to civil rights claims (3a). Alternatively, appellant argued that the prior decision of the New York Court of Appeals in *Mills v. County of Monroe,* 59 NY2d 307, cert. denied 484 U.S. 1018, which applied notice of claim statutes to civil rights claims, was distinguishable (2a).

On appeal to the Appellate Division of New York Supreme Court, appellant again tried to distinguish *Mills, supra* (3b), and also relied on federal cases which refused to interpret 42 U.S.C. §1988 as rendering applicable state notice of claim statutes (2b). Specific reliance was placed on the Court's decision in *Burnett v. Grattan,* 468 U.S. 42 (1984), as setting forth the manner in which 42 U.S.C. §1988 should be used to borrow state procedural rules (2b). Appellant's arguments to the New York Court of Appeals were identical to arguments made to the Appellate Division (2c-5c). In fact, appellant's brief to the New York Court of Appeals made no mention of the notice of claim issue at all. Only in a reply brief did appellant discuss 42 U.S.C. §1988 and its effect on borrowing the notice of claim statute.

Thus, appellant below did not attack the constitutionality of §50-i of the New York General Municipal Law.

A most telling admission that the unconstitutionality of the state statute was not attacked was appellant's failure to comply with New York Executive Law §71. That law requires a state court litigant who challenges the constitutionality of a state statute to apply to court to notify the State Attorney General to permit him to intervene and defend the constitutionality of the state statute. Appellant never applied for an order notifying the State Attorney General because appellant never thought of attacking the

constitutionality of New York General Municipal Law §50-i—until now.

By not attacking the constitutionality of the state statute, appellant has not "drawn into question" the validity of §50-i of New York General Municipal Law as required by 28 U.S.C. §1257(2). Thus, no appeal lies. *Garrity v. New Jersey,* 385 U.S. 493, 1495-6 (1967).

POINT III.

It is not necessary to reach the federal question.

Rule 16.1(d) permits appellee to urge any ground as a reason why the Court should dismiss the appeal and not set the case for argument.

The issue appellant seeks to be reviewed—i.e. whether 42 U.S.C. §1988 renders applicable a state statute requiring a notice of tort claim prior to a §1983 suit—need not be reached if the underlying §1983 action fails to state a claim or is time-barred. Such is the case here. Accordingly, if the case were set down for argument, the notice of claim issue need not be reached if affirmance would lie on these other grounds. Appellee may support the judgment appealed from by urging these defenses even though such were rejected by the Court below. *Hankerson v. N. Carolina,* 432 U.S. 233, 240 n.6 (1977); *Massachusetts Mut. Ins. Co. v. Ludwig,* 426 U.S. 479, 480-1 (1976).

Thus, if the case were set for argument the Court would need to decide what state statute of limitations should govern §1983 claims in New York and whether a §1983 claim is properly pleaded.

The complaint in this action contains two counts—Count I dealt with the alleged "destruction of value" of

appellant's property through excessive taxation, and Count II claimed a "taking" occurred because the City acquired the property for admitted tax delinquency (23d). For reasons that follow, Count I and Count II fail to state a claim and are time-barred.

a) The complaint is time-barred.

Appellee urged below, and would press vigorously in this Court, that the proper statute of limitations applicable to this claim is the one year and 90 day period of N.Y. General Municipal Law §50-i(1)c which governs both intentional and unintentional torts. Section 50-i covers "negligence and wrongful acts" and applies to any action for "personal injury", a term defined by New York law to include intentional as well as unintentional torts. New York General Construction Law §37-a. *Collins v. City of N.Y.*, 55 NY2d 646 (1982). *Drake v. City of Rochester,* 96 Misc. 2d 86, 92 (1978).

The Court's decision in *Wilson vs. Garcia,* 471 US 261 (1985) established the analytical framework to select the state statute of limitations governing a §1983 action. Since *Wilson,* where a state has both an intentional tort statute of limitations and a separate statute of limitations for unintentional torts, the Circuit Courts of Appeals have unanimously selected the intentional tort statute of limitations. *Mulligan v. Hazard,* 777 F.2d 340 (CA6, 1985) cert. denied 106 S. Ct. 2901, rehearing denied 107 S. Ct. 12 (1986); *Gates v. Spinks,* 771 F.2d 916 (CA5, 1985) cert. denied 106 S.Ct. 1378 (1986); *Jones v. Peruit and Mauldin,* 763 F.2d 1250 (CA11, 1985) cert. denied 106 S. Ct. 893 (1986). This Court has declined to review any of those decisions.

Contrary to this unanimous precedent, the Court below rejected an intentional tort statute of limitations and se-

lected a statute governing only unintentional torts (i.e., a negligence statute of limitations). *Bleilder v. Bodnan,* 65 NY2d 65, 66 (1985); *Graboi v. Kibel,* 432 F. Supp. 572 (SDNY, 1977). The statute selected, N.Y. CPLR §215(5), expressly excludes actions for intentional torts. Selecting a negligence statute of limitations is inconsistent with the approach of *Wilson, supra,* for the reasons discussed by the Circuit Courts of Appeals in *Mulligan, supra; Gates, supra,* and *Jones, supra.* Moreover, to select a negligence statute of limitations for §1983 actions is clearly erroneous since §1983 actions may not be based on negligent conduct. *Daniels v. Williams,* 106 S.Ct. 662 (1986).

Thus, the proper statute of limitations for §1983 actions in New York is not the 3 year negligence statute selected by the Court below but the one year and 90 day intentional tort statute of limitations of N.Y. General Municipal Law §50-i(1)c. Both Counts I and II of the complaint are time-barred under a one year and 90 day limitation period. The last act complained of occurred on April 9, 1979 (when the tax deed was filed) and the action was not commenced until almost three years later on April 2, 1982 (21d ¶58).

Even with the benefit of a three year statute of limitations, Count I of the complaint is still time-barred. Count I alleges that the City's purported overtaxation which occurred *prior* to the issuance of the tax deed in April 1979, allegedly destroyed the value of the property (23d). But, after appellant acquired the property in September 1976, the only acts taken by the City with respect to the property were as follows:

> (1) On July 1, 1977 the 1978 tax assessment was fixed.
>
> (2) On July 1, 1978 the 1979 tax assessment was fixed (July 1 is the taxable status date for the City. Charter §5-401[5]).

Thus, Count I's allegations properly encompass only these two City actions which occurred after appellant acquired the Property. Count I specifically excludes the April 9, 1979 taking of a tax deed as an element of Count I (23d ¶72). The April 1979 taking of a tax deed is the sole subject of Count II (24d ¶74A).

This action was not commenced within three years of either July 1, 1977 or July 1, 1978 and thus Count I is not timely under a three year statute of limitations. Appellant cannot point to any act which occurred within three years of April 2, 1982 (the date this action was deemed commenced) except the April 9, 1979 taking of the tax deed which is not the subject of Count I. Count I is thus time-barred even under a three year statute of limitations.

b) Count II fails to state a claim.

Count II challenges the City's acquisition of appellant's admitted tax delinquent property. Count II fails to state a claim because prior decisions of the Court have consistently held that nothing in the Constitution prevents the acquisition of tax delinquent property. *Nelson v. City of New York,* 352 U.S. 108 (1956); *Balthazar v. Mari Ltd.,* 301 F.Supp. 103, aff'd. 396 U.S. 114 (1969); *City of Auburn v. Mandarelli,* 320 A.2d 22 (Sup.Ct. Maine, 1974), appeal dismissed 419 U.S. 810 (1974).

In *Balthazar,* as here, a claim was made that the acquisition of tax delinquent property by a municipality constituted a "taking". The Court rejected the claim, stating: "Relying on Supreme Court condemnation cases, plaintiffs also maintain that they were deprived of 'just compensation' for their property * * *. These cases are inapplicable. Rather than taking private property for a public purpose, Illinois is here collecting taxes which are admittedly overdue." 301 F. Supp. 103, 105 n6, aff'd 396 U.S. 114.

The same result was reached in *Nelson v. City of New York*, 352 U.S. 103 (1956). There the City acquired two parcels for admitted tax delinquency. The City retained title to one parcel and sold the other parcel and kept the sale proceeds which exceeded the tax delinquency. The petitioners claimed that they were deprived of their property without due process of law and that their property was "taken" without just compensation. 352 U.S. at 109. The Court rejected such claims: "We hold that nothing in the Federal Constitution prevents this where the record shows adequate steps were taken to notify the owners of the charges due and the [tax] foreclosure proceedings". 352 U.S. at 110.

Appellant makes no claim that adequate steps to notify it were lacking, but simply claims that the tax deed itself and the alleged financial benefit the City enjoyed in acquiring the property constituted a "taking" (24d ¶74). Under the above cited authority, a "taking" does not occur in such circumstances. Count II, therefore, fails to state a claim.

Appellant's claim is not helped by general allegations that the tax deed was based on excessive taxes. As demonstrated in Subsection c of this Point, the Court in *City of Pittsburgh v. Alco Parking*, 417 U.S. 369 (1973) rejected the idea that excessive taxes can effect a "taking". In any event appellant refused to pay the 1976 taxes upon which the tax deed was based even after the New York courts reduced the 1976 taxes to $42,997 from $128,504 (Jurisdictional Statement p. A-6).

c) Count I fails to state a claim

Count I does not allege facts sufficient to state a claim that the Appellant's Property was "taken" in violation of its constitutional rights. Count I of the complaint alleges

that until the City took a tax deed to the Property on April 9, 1979, the City's purported overtaxation "virtually destroyed the value of the Property" so as to constitute a "taking" of plaintiff's Property (23d ¶72).

As previously noted in the Statement of the Case herein, close anlaysis reveals that the alleged pattern of overtaxation complained of largely predated appellant's acquisition of the Property. And as noted, appellant conceded below that the property's value was allegedly destroyed *prior* to its purchase (p. 2-3 herein).

Accordingly, appellant is precluded from relying on City practices and acts which predated its acquisition of the Property to support its claim. Appellant cannot assert or sue for the alleged violation of its predecessor's constitutional rights. *O'Malley v. Brierle,* 477 F2d 785, 789 (3rd Cir. 1973).

Appellant may properly rely only on the two City acts which occurred after its September 1976 purchase to support Count I: (1) the fixing of the 1978 tax assessment on July 1, 1977; and (2) the fixing of the 1979 tax assessment on July 1, 1978.

So construed, the gravamen of Count I is that the City overtaxed the Property for the 1978 and 1979 tax years to such a degree so as to effect a "taking" in violation of plaintiff's constitutional rights.

The Court "has * * * consistently rejected claims that the Due Process Clause of the Fourteenth Amendment stands as a barrier against taxes that are 'unreasonable' or 'unduly burdensome' ". *Commonwealth Edison v. Montana,* 453 U.S. 609, 622 (1981).

"The claim that a particular tax is so unreasonably high and unduly burdensome as to deny due process is both familiar and recurring, but the Court has consistently refused either to undertake the task of passing on the 'reasonableness' of a tax that otherwise is within the power * * * of state legislative authorities, or to hold that a tax is unconstitutional because it renders a business unprofitable". *City of Pittsburg v. Alco Parking,* 417 U.S. 369, 373. In *Alco Parking,* the Court rejected the argument that a revenue raising tax, if sufficiently burdensome, could be invalidated as a "taking" of property and rejected the idea that a court could hold a tax to effect a "taking" of property "from the fact, alone, that the tax appears excessive". 417 U.S. at 376.

In essense, County I alleges that a revenue raising tax was "excessive". Under the above authority "excessive" taxes do not effect a constitutional "taking". Therefore, even assuming the truth of the allegation that high taxes caused the value of the Property to be destroyed, Count I fails to state a claim for a "taking".

POINT IV.

No substantial federal question is presented.

No substantial federal question is presented because this Court's prior decisions support, and almost compel, the result reached below that 42 U.S.C. §1988 requires New York's notice of claim rules to be borrowed. *Robertson v. Wegmann,* 436 U.S. 584 (1978); *Board of Regents v. Tomanio,* 446 U.S. 478 (1980); *Chardon v. Fumero Soto,* 462 U.S. 650 (1983).

In 42 U.S.C. §1988, Congress itself commanded that where no federal rule exists, state law should govern §1983

actions absent inconsistency with federal law. *Robertson v. Wegmann,* 436 U.S. 584, 588-90; *Board of Regents v. Tomanio,* 446 U.S. 478, 484. Section 1988's reference to state law is not facially limited to statute of limitations but includes any state law. In fact, in *Robertson, supra,* the Court applied state laws governing the effect of the death of a §1983 plaintiff to determine whether the action would terminate. State rules governing "tolling, revival and questions of application" are also required to be borrowed under §1988. *Johnson v. Railway Express,* 421 U.S. 454, 464 (1975). Accordingly, Appellant's suggestion that notice of claim rules should not be borrowed because they are not "fundamental" to the judicial system is contrary to the command of §1988 (Jurisdictional Statement p.16).

Thus, the issue is whether New York's notice of claim rule is inconsistent with federal law so as to preclude its borrowing pursuant to 42 U.S.C. §1988. "Section 1988 authorizes federal courts to disregard an otherwise applicable state rule of law only if the state law is 'inconsistent with the Constitution and laws of the United States' ". *Board of Regents v. Tomanio,* 446 U.S. 478, 485 (1980).

Appellant has claimed "inconsistency" exists because *Burnett v. Grattan,* 468 U.S. 42 (1984) purportedly requires the practicalities of federal civil rights litigation to be considered in determining whether a state law is inconsistent with federal law. Appellant misreads *Burnett.* The Court expressly stated that it was not deciding the issue if an inconsistency with state law existed. "The step three inquiry—whether a state rule of decision is inconsistent with the Constitution or federal law—is not necessary to resolve this case * * *". 468 U.S. 42, 53 n.15. The practicalities of federal civil rights litigation are not relevant to the "inconsistency" issue because there is not "anything

peculiar to a federal civil rights claim that would justify reluctance in applying state law. Indeed the express terms of 42 U.S.C. §1988 suggest that the contrary is true". *Johnson v. Railway Express,* 421 U.S. 454, 464 (1975).

The correct approach to "inconsistency" was established in *Board of Regents v. Tomanio,* 446 U.S. 478, 487. "In order to gauge consistency * * * the state and federal policies which the respective legislatures sought to foster must be identified and compared".

The underlying policy behind §1983 is to secure compensation for, and to deter, violations of federal rights. *Robertson v. Wegmann,* 436 U.S. 584, 590-1 (1978). As the Court has stated, if §1983 plaintiffs can enforce their claims simply by complying with state law, then neither compensation nor deterrence is adversely affected. *Board of Regents v. Tomanio,* 446 U.S. 478, 488 (1980).

Thus, the reasoning of *Board of Regents* compels the conclusion that §1983's policies are not offended by borrowing New York's notice of claim rule. As the Court below noted " 'Neither of [§1983's] policies is significantly affected by the notice of claim requirement, since plaintiffs can readily enforce their claims, thereby recovering compensation and fostering deterrence, simply by filing a timely notice of claim' " [Jurisdictional Statement p. A-15, quoting *Cardo v. Lakeland Cent. Sch. Dist.,* 592 F. Supp. 765, 773 (SDNY, 1984)].

That §1983's policy of deterrence is not effected by borrowing New York's notice of claim rule is settled by the reasoning in *Robertson v. Wegmann,* 436 U.S. 584 (1978). There the Court noted that: "A state official contemplating illegal activity must always be prepared to face the prospect of a §1983 action being filed against him. In light

of this prospect, even an official aware of the intricacies of [state] law would hardly be influenced in his behavior by its provisions." 436 U.S. at 592. The Court below correctly applied this reasoning and held that §1983's goal of deterrence is not effected at all "because a municipal officer can never know in advance whether an injured party will timely file a notice of claim or be granted leave to file a late notice of claim". Jurisdictional Statement p. A-16.

Thus, there is no inconsistency with federal law or with §1983 in particular in applying New York's notice of claim rules. The reasoning and analysis employed by the Court in *Robertson v. Wegmann,* 436 U.S. 584 (1978), and *Board of Regents v. Tomanio,* 446 U.S. 478 (1980), fully support, if not compel, this conclusion. Accordingly, no substantial federal question is presented.

The policies underlying New York's notice of claim rule have also been held consistent with federal law and §1983 in particular.

The Court below noted that the notice of claim requirements of New York law "serve important state interests in that [a] governmental subdivision is allowed a meaningful opportunity to investigate the claim in a timely manner and thus protect itself against fraudulent claims" (Jurisdictional Statement, p. A-14).

The Court has also recognized these policies as important because a court's fact-finding function will "obviously be more reliable if the witnesses or testimony in question is relatively fresh. Thus, there comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely * * * to impair the accuracy of the fact-finding process * * *". *Board of Regents v. Tomanio,* 446 U.S. 478, 487. Thus the policy of preserving evidence

while fresh which underlies New York's notice of claim rule is consistent with federal law.

Moreover, the Court below also found that another purpose of notice of claim provisions was the "not inconsiderable benefit in reducing the burden on courts, both state and federal, when the notice results in negotiation and settlement of claims rather than litigation". Jurisdictional Statement p. A-16. Appellant does not, and could not, dispute that such a purpose is a federally favored policy.

This Court has twice denied certiorari to review the issue of whether 42 U.S.C. §1988 requires state notice of claim rules to be borrowed. Notably, the decision appealed from was not the first time that the New York Court of Appeals applied state notice of claim statutes to federal civil rights actions. In *Mills v. County of Monroe,* 59 NY2d 307 (1983), that Court applied state notice of claim rules to a federal civil rights claim and the Court denied certiorari. 484 U.S. 1018 (1983). More recently in *Clark v. Indiana,* 478 NE2d 699 cert. den. 106 S. Ct. 2893 (1986), the Court refused to review the exact issue presented here.

Lastly, even courts which have refused to borrow state notice of claim rules have been careful to expressly distinguish the effect of New York's notice of claim rules from the statutes before them. *Brown v. U.S.,* 742 F2d 1498 (CADC, 1984, en banc) cert. den. 471 U.S. 1073 (1985); *Fuchilla v. Layman,* 210 N.J. Super. 574, 510 A.2d 281 (1986). The *Brown, supra,* majority distinguished New York's notice of claim rules because of "the unusual flexibility of the relevant New York provision; it was subject to waiver by the court if to waive would promote equity or the action would vindicate the public interest". 742 F2d 1498, 1509 N.6. Accordingly, other court decisions on this

issue are not determinative of whether New York's notice of claim rules are consistent with federal law.

POINT V.

The appeal was not taken in conformity with this Court's Rules.

The Appellant has failed to comply with the Court's Rules in the following respects:

> a) A copy of the notice of appeal was not filed with the court possessed of the record [the Supreme Court, Onondaga County] as required by Rule 10.3
>
> b) Appellant has failed to comply with Rule 28.4(c) in that: (1) the jurisdictional statement fails to recite that 28 U.S.C. §2403(b) may be applicable (under Appellant's view of this matter); and (2) no jurisdictional statement was served on the Attorney General of New York.

POINT VI.

Certiorari should be denied.

If the appeal is dismissed, certiorari should be denied for the reasons already set forth herein and for the additional reasons discussed in this Point.

The alleged conflict of the decision at bar with those of other states presents no federal question. In enacting §1988 Congress decreed that differences among the states would exist by borrowing state law. "Congress * * * sees

no need for national uniformity in all aspects of civil rights litigation". *Burnett v. Grattan,* 468 U.S. 42, 52 n.14 (1984).

And appellant's claim of a perceived conflict with federal courts in New York does not withstand scrutiny. As appellant concedes the District Courts in New York are split on the issue. But the Circuit Court of Appeals has yet to address the issue. Appellant's reliance on *Brandon v. Bd. of Education,* 635 F2d 971 (CA 2, 1980) cert. den. 454 U.S. 1123 (1981) as evidencing a conflict is misplaced (Jurisdictional Statement p. 11). The Court below applied the notice of claim rule only to money damage actions, not equitable relief, in accordance with settled New York law. *Fontana v. Town,* 13 NY2d 1134 (1964); *Fracolla v. City of Utica,* 77 AD2d 161, 165 (1980). However, the plaintiffs in *Brandon* moved for summary judgment only on their equitable claims for declaratory and injunctive relief. 487 F. Supp. 1219, 1223. Accordingly, New York's notice of claim rules did not by their terms apply to the *Brandon* plaintiffs. In fact the Court of Appeals noted that the notice of claim defense was raised to bar a "non-tort claim". 635 F2d 971, 973-4 n.2. Thus, the applicability of New York's notice of claim rule to a money damage claim was not an issue in *Brandon.* Moreover, since the plaintiffs in *Brandon* were seeking to protect the rights of parties not before the court on an important issue, (487 F. Supp. 1219, 1223, n.5), even if the notice of claim rule applied, the "public interest exception" would have rendered New York's notice of claim requirements inapplicable.

In light of the above, it is not accurate to state that the Second Circuit has considered the effect of New York's notice of claim rule to money damage actions under §1983 and reached a contrary result.

Appellant suggests that §1988 should not be used to borrow state notice of claim rules because federal law is not "deficient" with respect to the issue. (Jurisdictional Statement, p. 16). Appellant misreads the Court's decisions on when a deficiency in federal law exists. "Federal law simply does not 'cover every issue that may arise in the context of a federal civil rights action' * * * When federal law is thus deficient, §1988 instructs us to turn to the 'common law, as modified and changed by the Constitution and statutes of the [forum] state' * * *". *Robertson v. Wegmann,* 436 U.S. 584, 588 (1978) (citation omitted).

Appellant's extended discussion on the purported burden that a New York's notice of claim rule would impose on §1983 plaintiffs is irrelevant and inaccurate. (Jurisdictional Statement p. 13-19).

The discussion is not relevant because appellant would reject borrowing New York's notice of claim rule because appellant and other §1983 plaintiffs would lose their cases. The Court has specifically rejected such an approach. "A state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation. If success of the §1983 plaintiff were the only benchmark, there would be no reason at all to look to state law * * * But §1988 quite clearly instructs us to refer to state statutes; it does not say state law is to be accepted or rejected based solely on which side is advantaged thereby". *Robertson v. Wegmann,* 436 U.S. 584, 593 (1978).

Even if the appellant's reference to the so-called burdensome effect of New York's notice of claim rule on §1983 plaintiffs was relevant, its characterization of the effect of the New York rule is inaccurate. As the Court below noted a §1983 claim will "be barred if the claimant

neither gives notice within 90 days, nor within the next two years and nine months seeks an extension of the right to do so". Jurisdictional Statement p. A-18. In this respect a New York §1983 claimant is less burdened by the rule than, for example, claimants in Tennessee, Ohio, Mississippi, Louisiana and Puerto Rico who are forever barred if suit is not commenced within a year. *Johnson v. Railway Ass'n.*, 421 U.S. 454 (1975) [Tennessee]; *Chardon v. Soto,* 462 U.S. 650 [Puerto Rico], *Mulligan v. Hazard,* 777 F2d 340 (CA6, 1985) cert. den. 106 S. Ct. 2901, rehearing den. 107 S. Ct. 12 (1986) [Ohio]; *Gates v. Spinks,* 771 F2d 916 (CA5, 1985) cert. den. 106 S. Ct. 1378 (1986) [Mississippi]; *St. Amant v. Benoit,* 806 F2d 1294 (CA5, 1987) [Louisiana].

Even if a §1983 claimant fails to file a notice within 90 days, New York's statute and court decisions establish an extremely liberal attitude to permit a late filing. The legislative history behind the 1977 amendments to §50-e of the General Municipal Law shows a legislative encouragement to excuse plaintiffs who fail to meet the initial 90 day filing requirement and a dissatisfaction with past judicial decisions denying late filing applications. "It is intended that older judicial decisions construing the provisions of §50-e rigidly and narrowly will be inapplicable as a result of these remedial amendments which will enable the courts to apply these provisions in a more flexible manner to do substantial justice [p. 288]. * * * The proposed amendment to subdivision 5 would significantly extend the discretion of the court to grant leave to file a late notice of claim. The subdivision, as amended, reflects a substantial change in policy * * * giving the court greater flexibility in exercising discretion in this area * * * Courts [would be] given broad discretion to extend the time to serve a notice of claim beyond the 90 day limit [p. 300-

301]'' Twenty-First Annual Report of N.Y. Judicial Conference, 1978.

In the ten years since the amended 50-e of the General Municipal Law has been applicable, courts have been extremely permissive in authorizing late filings. Contrary to appellant's assertion, there is no need for a claimant to tender an excuse, *Chatman v. White Plains,* 101 AD2d 838 (1984); *Cicio v. N.Y.C.,* 98 AD2d 38 (1982). If municipal officers have prepared reports of the incident (a very common circumstance) late filings are routinely granted. *Inness v. County,* 62 NY2d 779 (1984); *Law v. City of Rochester,* 107 AD2d 1089 (1985); *Cicio, supra.* The statute itself permits a court to take into account ''all relevant facts and circumstances'' Jurisdictional Statement p. 6, §50-e[5]. United States District Courts have permitted late filings in diversity suits and notably have permitted such even in situations where the municipality may have lacked actual notice of all the facts and the notice of claim was a year late. *Palazzo v. City of N.Y.,* 444 F. Supp. 1089 (EDNY, 1978).

Moreover, as the Court below noted a notice of claim need not be served at all if the action is brought to protect an important right. Jurisdictional Statement p. A-19. This so-called ''public interest'' exception has been liberally construed to render notice of claim filings unnecessary. For example, persons aggrieved by governmental action in excess of jurisdiction are exempted from filing [*Niagara Mohawk v. City,* 59 NY2d 262 (1983)]; teachers seeking to be granted tenure need not file, even though only their tenure is at issue, because of the importance of New York's statutory tenure scheme [*Cowan v. Bd. of Ed.,* 99 AD2d 831 (1984)]; plaintiffs generally challenging important governmental action also have been exempted from filing. *Industrial Refuse Systems, Inc. v. O'Rourke,* 509 N.Y.S. 2d 988, 990 (1986).

Simply stated New York's notice of claim rule is a very flexible and fair rule which can be easily satisfied by any §1983 plaintiff. This has been recognized even by courts which have refused to borrow other states' notice of claim rules. *Brown v. U.S.*, 742 F2d 1498 (CADC, 1984, *en banc*) cert. den. 471 U.S. 1073 (1985); *Fuchilla v. Layman,* 210 N.J. Super. 574, 510 A.2d 281 (1986). The *Brown, supra,* majority distinguished New York's notice of claim rules because of "the unusual flexibility of the relevant New York provision; it was subject to waiver by the court if to waive would promote equity or the action would vindicate the public interest". 742 F2d 1498, 1509 n.6.

In conclusion, certiorari should be denied if the appeal is dismissed.

Respectfully submitted,

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APPENDIX A— Pages 26-29 of Brief at Supreme Court, Special Term.

(26) **POINT II.**

Plaintiff's action is not barred by the Notice of Claim provisions of State or Local Law.

Defendant City seeks to dismiss this action on the additional ground that plaintiff did not file a notice of claim within ninety days of the accrual of plaintiff's cause of action. The City relies in part on Section 50-i (1)(c) of the General Municipal Law to support its argument. That section provides in pertinent part:

> 1. No action or special proceeding shall be prosecuted or maintained against a city, county, village, fire district or school district for personal injury, wrongful death or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of such city, county, town, village, fire district or school district or of any officer, agent or employee thereof, including volunteer firemen of any such city, county, town, village, fire district or school district or any volunteer fireman whose services have been accepted pursuant to the provisions of section two hundred nine-i of this chapter, unless, (a) a notice of claim shall have been made and served upon the city, county, town, village, fire district or school district in compliance with section fifty-e of this chapter.
>
> . . .

In addition, the City offers the notice of claim requirements of its own Charter Section 8-115, which is broader in scope than the Section 50-i requirements, as a basis for

dismissal. For the reasons which follow, neither section 50-i nor the City Charter (27) requires the service of a notice of claim as a condition precedent to the maintenance of this action.

Further, even assuming that either §50-i or the City Charter provision controls, the City received written notice more than sufficient to satisfy the notice of claim requirements. Accordingly, the notice of claim requirement of 50-i or the City Charter does not preclude the maintenance of this action.

A. The Notice of Claim Requirement of Section 50-i of the General Municipal Law Does Not Apply to This Action.

Plaintiff's action is one for a wrongful deprivation of property in violation of the Constitution. As such, the Complaint alleges an "*injury* to property" rather than a "*damage* to property." For the reasons stated in Point I (B), *supra,* §50-i is not intended to apply to such an action.

Defendant City relies on the case of *Mills v. County of Monroe,* 59 N.Y.2d 307, 464 N.Y.S.2d 709 (1983) for the proposition that plaintiff was required to serve a notice of claim in this action. Defendant's reliance, however, is misplaced. First, and critically, the *Mills* Court, in affirming a specific finding of the Appellate Division, found the notice requirement of the County Law applicable, but *rejected* the municipality's argument that the General Muncipal Law notice of claim requirement barred that plaintiff's action. *See, e.g., Mills v. County of Monroe,* 89 A.D.2d 776, 453 N.Y.S.2d 486 (4th Dept. 1982).
(28) Second, in *Mills,* the plaintiff brought suit under 42 U.S.C. §1981, not section 1983, alleging employment discrimination based on race and national origin. An important component of the Court's decision in *Mills* was that State law provided a closely analogous claim in Executive Law §296. As the Court of Appeals held that the notice of

claim requirements of County Law §52 applied to that "closely analogous" State claim, the notice of claim requirements were also held to apply to a federal civil rights action based on an identical set of facts. By contrast, §1983 has no counterpart in State law, and the *Mills* decision is therefore inapplicable to this case.

Section 50-k(6) of the General Municipal Law lends further support to plaintiff's contention that the Legislature did not intend §50-i to apply to the within action. That section expressly provides that in federal civil rights actions against employees of the City of New York, the notice of claim requirement does not apply. Clearly, the Legislature never intended to require the service of a notice of claim in federal civil rights actions. This legislative intent is consistent with numerous federal cases which held that no notice of claim was required for §1983 actions. *See, e.g., Brandon v. Board of Education,* 487 F. Supp. 1219 (N.D.N.Y.), *aff'd,* 635 F.2d 971 (2d Cir. 1980), *cert.* (29) *denied,* 454 U.S. 1123 (1981); *Laverne v. Corning,* 316 F. Supp. 629 (S.D.N.Y. 1970).

Plaintiff's causes of action are grounded in the constitution, and seek a remedy for a wrongful deprivation of property. The *Mills* court did not decide a deprivation of property case, and indeed, held General Municipal Law §50-i inapplicable to the civil rights case before it.

C. The City Charter Notice Requirement is Preempted by State Law and Cannot Bar this Action.

The City has offered the Notice of Claim requirement of the City Charter §8-115 that a notice of claim be filed for *any* action against the City within the ninety day time period of General Municipal Law §50-e as an additional theory for dismissal. On its face, this local law purports to require notices of claim as a condition precedent to actions not embraced by the General Municipal Law notice requirements. It is respectfully submitted that this local law

is preempted by the General Municipal Law and is of no effect whatsoever here.

The New York State Constitution prohibits the making of local laws which conflict with general state statutes:

> (ii) every local government shall have power to adopt and amend local laws *not inconsistent with* the provisions of this constitution or *any general law* relating to the following subjects . . .
>
> (5) The presentation, ascertainment and discharge of claims against it.

APPENDIX B—Pages 36-44 of Brief for Plaintiff-Appellant in Appellate Division, Fourth Department.

(36)

POINT III

The notice of claim provisions of the General Municipal Law and the Syracuse City Charter cannot constitutionally apply to this case; but even if they do, there was legally adequate compliance therewith.

The court below found that plaintiff did not file a notice of claim within ninety days of the accrual of its cause of action in compliance with Section 50-i (1)(c) of the General Municipal Law. That section provides, in pertinent part:

> 1. No action or special proceeding shall be prosecuted or maintained against a city . . . for personal injury, wrongful death or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of such city . . . unless, (a) a notice of claim shall have been made and served upon the city . . . in compliance with section fifty-e of this chapter . . .

In addition, the lower court cited the ninety day requirement of the Syracuse City Charter Section 8-115, which encompasses "broader notice of claim provisions". (21)

A. As a Matter of Federal Law, State and Local Notice of Claim Requirements Do Not Apply to Federal Civil Rights Actions.

Federal law must determine whether a notice of claim provision of state or local law will operate to bar a Sec. 1983 action. *See, e.g., United Auto Workers v. Hoosier Cardinal Corporation,* 383 U.S. 696 (1966). As is the case with statutes of (37) limitations themselves, state courts

merely interpret state notice of claim statutes, but the issue of whether they apply to a federal civil rights action is a matter of federal law, to be determined by the federal courts. *See Pauk v. Board of Trustees,* Point II, *supra; see also Fields v. Board of Higher Education of the City of New York,* Point II, *supra.*

Federal cases have uniformly held that New York's notice of claim statutes cannot bar a federal civil rights action. *See, e.g., Brandon v. Board of Education,* 487 F.Supp. 1219 (N.D.N.Y. 1980), *aff'd,* 635 F.2d 971 (2d Cir.), *cert. denied,* 454 U.S. 1123 (1981); *Glover v. City of New York,* 401 F.Supp. 632, 635 (E.D.N.Y. 1975); *Carrasco v. Klein,* 381 F.Supp. 782, 787, n. 12 (E.D.N.Y. 1974); *Laverne v. Corning,* 316 F.Supp. 629, 637 (S.D.N.Y. 1970).

Any doubt as to this issue was laid to rest by the United States Supreme Court in *Burnett v. Grattan,* cited in Point II, *supra.* The Court, in considering the propriety of state law in relation to federal civil rights claims, said:

> A state law is not "appropriate" if it fails to take in to account practicalities that are involved in litigating federal civil rights claims and policies that are analogous to the goals of the Civil Rights Acts. . . . Litigating a civil rights claim requires considerable preparation. *An injured person must recognize the constitutional dimensions of his injury.* . . . "State legislatures do not devise their limitations period with national interests in mind, and it is the duty of federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies." (Emphasis supplied.)

____ U.S. at ____, 82 L.Ed.2d at 44-46.

(38) The condition precedent of a 90 day notice reflects a narrow state policy of providing repose to municipal officials and providing the opportunity to investigate the facts underlying a tort claim while those facts are still fresh. This policy is "inconsistent with, or or marginal relevance to" the goals of Sec. 1983 in "compensation of persons whose civil rights have been violated, and prevention of the abuse of state power." *Burnett v. Grattan,* ____ U.S. at ____, 82 L.Ed.2d at 47. The Supreme Court, quoting *Pauk, supra,* reaffirmed that:

> It would be anomalous for a federal court to apply a state policy restricting remedies against public officials to a federal statute that is designed to augment remedies against those officials, especially a federal statute that affords remedies for the protection of constitutional rights.

____ U.S. at ____, 82 L.Ed.2d at 48, fn. 18.

Here, moreover, the oppressive conduct of the City of Syracuse was consciously pursued, publicly acknowledged, and frequently censured by the courts of this State. (197-200) (*See* Attachment "B".) Syracuse needed no opportunity to investigate the facts.

The court below, in dismissing plaintiff's Complaint, relied on the decision of the New York Court of Appeals in *Mills v. County of Monroe,* 59 N.Y.2d 307 (1983). The *Mills* court found that the state's notice of claim requirements are not antithetical to the policies underlying the civil rights laws. However, (39) appellant respectfully submits that, in view of the federal supremacy in such matters and in view of the subsequent reasoning of the U.S. Supreme Court in *Burnett, supra,* and the subsequent holding of the Court of Appeals itself in *Fields v. Board of Higher Education,* N.Y.L.J., Oct. 11, 1984, at 5, col. 1

(N.Y. Oct. 9, 1984), the *Mills* decision is no longer authoritative. Even if it were, it is readily distinguishable, as are the cases of *Phelps Steel, Inc. v. City of Glens Falls,* 89 A.D.2d 652 (3d Dept. 1982), and *Alaxanian v. City of Troy,* 69 A.D.2d 937 (3d Dept. 1979), also cited by the court below.

It is critical to note that, in *Mills,* both this Court and the Court of Appeals held that Section 50-i of the General Municipal Law was inapplicable because it ". . . is confined to tort claims for personal injury, wrongful death or damage to property and not to torts generally." *Mills v. County of Monroe,* 89 A.D.2d 776, 776 (4th Dept. 1982), *aff'd,* 59 N.Y.2d 307 (1983).

The inapplicability of §50-i (and hence §50-e) was conclusively established in *Fields, supra.* However, in *Mills,* both this Court and the Court of Appeals proceeded to find that Section 52 of the County Law, *a state statute,* was broader in scope than Section 50-i and did embrace the *Mills* claim for wrongful discharge based on discrimination. Appellant submits that inverse condemnation, like wrongful discharge based on discrimination, is not a claim embraced by Section 50-i. Nor should this Court affirm the lower court's effort to parallel the Charter of the City of Syracuse to the County Law. The Charter is a *local* law, not a *state* law, and hence is pre-empted by the General Municipal Law itself and by the New York Constitution which provides:

> (ii) every local government shall have power to adopt and amend local laws *not inconsistent with the provisions of this constitution or any general law* relating to the following subjects . . .
>
> (5) the presentation, ascertainment and discharge of claims against it.

(6) the acquistion . . . of its . . . property.

N.Y. Const. Art. IX, §2(c). (Emphasis supplied.) To the same effect, *see* Municipal Home Rule Law Section 10(1)(ii)(a)(5) and (6).

The General Municipal Law states: "This section shall be applicable notwithstanding any inconsistent provisions of any law, general, special or local, *or limitation contained in the provisions of any city charter*". General Municipal Law §50-i(2). (Emphasis supplied.) In *Zumbo v. Town of Farmington,* 60 A.D.2d 350 (4th Dept. 1978), this Court relied on this section to strike down a local notice requirement where a local law required prior notice of unsafe town property as a condition precedent to suit, although the General Municipal Law required none.

In dismissing the Town's affirmative defense of failure to give prior notice, this Court stated:

> Where the State has acted upon a subject and, in so acting, has evidenced a desire that its general laws should preempt the possibility of varying local laws, a local enactment may be said to be inconsistent with State law because it prohibits that which has been found acceptable under State law. (Citations omitted.)

60 A.D.2d at 354.

Similarly, in *Matter of 749 Broadway Realty Corp. v. Boyland,* 1 Misc.2d 575 (Sup. Ct. N.Y. Cnty. 1955), *aff'd* 1 A.D.2d 819 (1st Dept. 1956), *aff'd,* 3 N.Y.2d 737 (1957), the Court struck down a city ordinance which imposed requirements in addition to State statutes as a prerequisite for judicial review of tax assessments. In voiding that local law, the Court held that "[c]ities may not curb or control the jurisdiction or procedure of courts" by in-

terposing barriers to review more extreme than state legislation. 1 Misc.2d at 478.

The facts in the *Mills* case did not present the state-local preemption issue. Clearly, since the power to condemn is a sovereign, not a municipal function (absent delegation), *Fifth Avenue Coach Lines, Inc. v. City of New York*, 11 N.Y.2d 342 (1962), a municipality's power to take is limited by Article 5 of the Eminent Domain Procedure Law. Under the EDPL, municipalities must seek an order vesting title and fixing the time within which claims must be filed. Obviously, the City of Syracuse did not do so. Arguably, therefore, no period of limitations ever began to run. Had the City complied with State law and applied to the (42) Court for an order vesting title the plaintiff would have had formal notice of whatever time the Court might have fixed.

The *Fields* case suggests yet another reason for rejecting the application of the Syracuse City Charter's notice of claim provision as preempted by State law. Considering the need for harmony between federal and state limitations periods, the *Fields* Court rejected the applicability of General Municipal Law §50-i's one year and ninety day statute of limitations to civil rights actions. The inapplicability of the limitations period of §50-i necessarily prohibits the applicability of its notice of claim provision. Similarly, the Syracuse City Charter provides a one year and ninety day statute of limitations and a ninety day notice of claim condition precedent to actions which fall within that Charter provision. *See* Syracuse City Charter §8-115. Since the one year and ninety day statute of limitations contained in the City Charter is clearly inapplicable for the same reasons that apply to General Municipal Law §50-i, the Charter's notice of claim requirement must also be inapplicable.

Moreover, it is entirely reasonable to expect that the "public interest" exception discussed by the Court of Ap-

peals in *Mills*, 59 N.Y.2d at 311, should apply here. The public interest in preventing unconstitutional taxation is beyond dispute. *See, e.g., Hurd v. City of Buffalo,* 34 N.Y.2d 628 (1974), *aff'g,* 41 A.D.2d 402 (4th Dept. 1972); *Bethlehem Steel Corporation v. Board* (43) *of Education,* 44 N.Y.2d 831 (1978), *mod'g and aff'g,* 61 A.D.2d 147 (4th Dept.); *Angelone v. City of Rochester,* 72 A.D.2d 445 (4th Dept. 1980), *aff'd,* 52 N.Y.2d 984 (1981). Plaintiff's action can readily be viewed as one whose resolution would directly affect the rights of property owners throughout the State of New York. Syracuse's avowed policy of blatant overtaxation is continuing and this Court should vindicate the rights of the citizens of Syracuse (and of other cities which may follow its example) to fend off confiscatory taxation. To do otherwise would endorse a policy which immerses property owners in protracted litigation and obliges them to continue to pay admittedly illegal taxes which even large corporations like W.T. Grant and well-endowed universities like the University of Rochester are unable to pay on unrentable real estate.

The lower court in applying the "gravamen or essence" test of *Staffen* which is no longer the law in New York in light of *Fields,* apparently relied on *Phelps* because of its clearly mistaken conclusion that this case, like *Phelps,* involved the tort of conversion. Inasmuch as personal property (a building design) was the subject of the action in *Phelps,* the tort of conversion could properly be found. But, it is a hornbook principle of tort law that conversion applies only to personal property; real property cannot be the subject of that common law tort. 23 N.Y. Jur. 2d, (44) *Conversion and Action for Recovery of Chattel,* §4; Prosser, *Torts,* 4th ed. (1971), p. 81.

Since papers filed by plaintiff in this case at the time it obtained the Preliminary Injunction in May of 1979 (164-171, 205) clearly raised the constitutional questions, the rationale employed for dismissing the complaint in the

Alaxanian case is inapplicable here. (*See* Point III (B), immediately following.)

B. Assuming, *Arguendo*, that a Notice of Claim was Required, the Facts Indicate *De Facto* Compliance Therewith.

On May 4, 1979, twenty-five days after the April 2, 1979 Tax Deed, the City of Syracuse was served by plaintiff with an Order to Show Cause on the motion for the Preliminary Injunction restraining the City from transferring the Property to third parties. Paragraph "11" of the affidavit of plaintiff's then attorney, (205) submitted in support thereof, placed the City on notice of its constitutional claims:

> The City's constant return to the 1964 assessment of $1,135,700 amounts to confiscation of plaintiff's property and unconstitutional taxation. . . . (205)

The balance of that affidavit, and the affidavit of Malcolm A. Sutton, also submitted in support of the motion, plainly and unequivocally notified the City of the facts underlying plaintiff's cause of action. (202-216) Plaintiff even asked for alternative relief, in the nature of damages for the taking of the Property. (224)

APPENDIX C—Pages 10-19 of Reply Brief of Plaintiff-Appellant in New York Court of Appeals.

10

POINT II.

The notice of claim provisions of the General Municipal Law and the Syracuse City Charter cannot constitutionally apply to this case; but even if they do, there was legally adequate compliance therewith.

The City continues to urge that this case be dismissed because Plaintiff did not file a notice of claim within ninety days of the accrual of its cause of action in compliance with Section 50-i (1)(c) of the General Municipal Law and Section 8-115(2) of the Syracuse City Charter.

A. As a Matter of Federal Law, State and Local Notice of Claim Requirements Do Not Apply to Federal Civil Rights Actions

As the Supreme Court pointed out in *Wilson v. Garcia* (471 U.S. ____, 85 L.Ed.2d 254 [1985]), *supra*, all questions relating to Section 1983 are federal questions except:

> . . . the length of the limitations period and closely related questions of tolling and application, are to be governed by state law.

(*Wilson v. Garcia*, 262, *supra*).

(See *Pauk v. Board of Trustees*, 654 F.2d 856, 865-866 [CCA2d 1982], cert den 455 U.S. 1000 [1982]; see also *Fields v. Board of Higher Educ. of City of New York*, Point I, *supra*).

When it enacted the Civil Rights Act, Congress did not include the need to file a notice of claim. See *Brown v. United* (11) *States* (742 F.2d 1498, 1506-1509 [D.C.Cir. 1984], cert den 85 L.Ed.2d 509 [1985]). There is no admo-

nition in Section 1988 to look to applicable state or local "notice of claim" requirements similar to its admonition relating to the statute of limitations.

Notice of claim provisions which are found in statutes such as the N.Y. General Municipal Law or Syracuse City Charter are historically linked to the waiver of sovereign immunity. (See e.g. *Luker v. Nelson,* 341 F.Supp. 111, 117 [N.D.Ill. 1972] and *Williams v. Horvath,* 129 Cal Rptr 453, 548 P.2d 1125, 1130 [1976].) However, no state or municipality ever had sovereign immunity from a claim under Section 1983. Had it been otherwise, the supremacy clause of the United States Constitution and congressionally created rights thereunder would have been eviscerated by state and local concepts of sovereign immunity and the federal policy of augmenting constitutional remedies would have been fatally undermined (*Donovan v. Reinbold,* 433 F.2d 738, 742 [CCA9th 1970]; *Williams v. Horvath, supra; Brown v. United States, supra; Altaire Bldrs. v. Village of Horseheads,* 551 F.Supp. 1066, at 1076 [W.D.N.Y. 1982]; Also see *Owen v. City of Independence,* 445 U.S. 622, 635-637 [1980].)

As discussed in *Burroughs v. Holiday Inn* (606 F.Supp 629, affd on reh 621 F.Supp 351 [W.D.N.Y. 1985]), not every silence in the federal law is a gap or void to be filled by state law.

(12) Many other federal cases have consistently held that New York's notice of claim statutes cannot bar a Federal civil rights action. (See, *Brandon v. Board of Educ.,* 487 F.Supp. 1219 [N.D.N.Y. 1980]), affd 635 F.2d 971 [CCA2d 1980], cert den 454 U.S. 1123 [1981]; *Williams v. Allen,* 616 F.Supp. 653, 658 [E.D.N.Y. 1985]; *Glover v. City of New York,* 401 F.Supp. 632, 635 [E.D.N.Y. 1975]; *Carrasco v. Klein,* 381 F.Supp. 782, 787 n.12 [E.D.N.Y. 1974]; *Laverne v. Corning,* 316 F.Supp. 629, 637 [S.D.N.Y. 1970].)

The conceptual imperative for rejecting notice of claim provisions is evident from a reading of the decisions of the United States Supreme Court in *Wilson v. Garcia, supra* and *Burnett v. Grattan* (468 U.S. 42, 104 S.Ct. 421, 82 L.Ed.2d 36 [1984].) The *Burnett* Court, in considering the propriety of state law in relation to Federal civil rights claims, said:

> A state law is not "appropriate" if it fails to take into account practicalities that are involved in litigating federal civil rights claims and policies that are analogous to the goals of the Civil Rights Acts. . . . Litigating a civil rights claim requires considerable preparation. *An injured person must recognize the constitutional dimensions of his injury.* . . . "State legislatures do not devise their limitations period with national interests in mind, and it is the duty of federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies." (Emphasis supplied.)

(*Burnett v. Grattan,* 468 U.S. 42, 50-52, 82 L.Ed.2d, 44-46, *supra*).

(13) The condition precedent of a 90 day notice reflects a narrow state policy of providing repose to municipalities and providing the opportunity to investigate the facts underlying a tort claim while those facts are still fresh. This policy is "inconsistent with, or of marginal relevance to" the goals of Section 1983 in "compensation of persons whose civil rights have been violated, and prevention of the abuse of state power." *Burnett v. Grattan* (468 U.S. 42, 53, 82 L.Ed.2d 36, 47 [1984] *supra*). The Court, quoting *Pauk, supra,* went on to say:

> It would be anomalous for a federal court to apply a state policy restricting remedies against public officials to a federal statute that is designed to augment remedies against those officials, especially a federal statute that affords remedies for the protection of constitutional rights.

(*Burnett v. Grattan,* 468 U.S. 42, fn 18, 82 L.Ed.2d 36, *supra*).

Here, moreover, the oppressive conduct of the City of Syracuse was consciously pursued, publicly acknowledged, and frequently censured by the courts of this State (197-200). (*See* Attachment "C" to Plaintiff's brief in chief.) Syracuse needed no opportunity to investigate the facts.

Special Term, in dismissing Plaintiff's Complaint, relied on the decision of this Court in *Mills v. County of Monroe,* 59 N.Y.2d 307 (1983). The *Mills* court found that the State's notice of claim requirements are not antithetical to the policies underlying (14) the Civil Rights Law. However, Plaintiff respectfully submits that, in view of the federal supremacy in such matters and in view of the subsequent holdings of the U.S. Supreme Court in *Burnett and Wilson, supra,* and the subsequent holding of this court in *Fields v. Board of Higher Educ. of City of New York* (63 N.Y.2d 817 [1984]), the *Mills* decision is no longer authoritative.

Mills, Cardo v. Lakeland Cent. School Dist. (592 F.Supp. 765 [S.D.N.Y. 1984]) and *Indiana Dept. of Public Welfare v. Clark* (478 N.E.2d 699 [CT.App. Ind. 1985]), each seek to ascertain whether a notice of claim is needed by looking to the gravamen of the underlying cause of action. These cases all predate *Wilson v. Garcia, supra* which expressly rejected that approach in the interest of uniformity of remedies for Section 1983 violations.

We respectfully urge this Court to now expressly repudiate *Mills*. But, even if the *Mills* case has some vitality, it is readily distinguishable, as are the cases of *Phelps Steel v. City of Glens Falls* (89 A.D.2d 652 [3d Dept. 1982]), and *Alaxanian v. City of Troy* (69 A.D.2d 937 [3d Dept. 1979]), also cited by the City in its answering brief.

The *Mills* case involved the applicability of the County Law Section 52 notice of claim provision to a Civil Rights claim based on a wrongful discharge. Both the Appellate Division and this court held that Section 50-i of the General Municipal Law was inapplicable because it ". . . is confined to tort claims for (15) personal injury, wrongful death, or damage to property and not to torts generally" (*Mills v. County of Monroe,* 89 A.D.2d 776, 776 [4th Dept. 1982], affd, 59 N.Y.2d 307 [1983].)

However, the courts then proceeded to find that Section 52 of the County Law, *a State statute,* was broader in scope than Section 50-i and did embrace the *Mills* claim for wrongful discharge based on discrimination. Plaintiff submits that inverse condemnation, like wrongful discharge based on discrimination, is not a claim embraced by Section 50-i. Moreover, to parallel the Charter of the City of Syracuse to the County Law is not justified by *Mills*. The Charter is a *local* law, not *state* law, and hence is pre-empted by the General Municipal Law itself and by the New York Constitution which provides:

> (ii) every local government shall have power to adopt and amend local laws *not inconsistent with the provisions of this constitution or any general law* relating to the following subjects . . .
> (5) the presentation, ascertainment and discharge of claims against it.
> (6) the acquisition . . . of its . . . property.

N.Y. Const. Art. IX, §2(c). (Emphasis supplied.) To the same effect, *see* Municipal Home Rule Law Section 10(1)(ii)(a)(5) and (6).

The General Muncipal Law states: "This section shall be applicable notwithstanding any inconsistent provisions of law, (16) general, special or local, *or any limitation contained in the provisions of any city charter*" (General Municipal Law §50-i[2] [Emphasis supplied].) In *Zumbo v. Town of Farmington* (60 A.D.2d 350 [4th Dept. 1978]), the Appellate Division relied on this section to strike down a local notice requirement where a local law required prior notice of unsafe town property as a condition precedent to suit, although the General Municipal Law required none.

In dismissing the Town's affirmative defense of failure to give prior notice, the Appellate Division stated:

> Where the State has acted upon a subject and, in so acting, has evidenced a desire that its general laws should preempt the possibility of varying local laws, a local enactment may be said to be inconsistent with State law because it prohibits that which has been found acceptable under State law. (Citations omitted.)

(*Zumbo v. Town of Farmington*, 60 A.D.2d 350, 354, *supra*).

Similarly, in *Matter of 749 Broadway Realty Corp. v. Boyland* (1 Misc.2d 575 [Sup.Ct. N.Y. Cnty. 1955], affd 1 A.D.2d 819 [1st Dept. 1956], affd 3 N.Y.2d 737 [1957]), this Court struck down a city ordinance which imposed requirements in addition to state statutes as a prerequisite for judicial review of tax assessments. In voiding that local law, this Court held that "[c]ities may not curb or control the jurisdiction or procedure of courts" by interposing barriers to review more extreme than state legislation

(17) (*Matter of 749 Broadway Realty Corp. v. Boyland,* 1 Misc.2d 575, 578, *supra*).

A further distinguishing factor is the fact that the *Mills* case did not present the state-local preemption issue. Clearly, since the power to condemn is a sovereign, not a municipal function (absent delegation), *Fifth Avenue Coach Lines v. City of New York* (11 N.Y.2d 342 [1962]), a municipality's power to take real property is limited by Article 5 of the Eminent Domain Procedure Law. Under the EDPL, municipalities must seek an order vesting title and fixing the time within which claims must be filed. Obviously, the City of Syracuse did not do so. Arguably, therefore, no period of limitations ever began to run. Had the City complied with State law and applied to the Court for an order vesting title, the Plaintiff would have had formal notice of whatever time the Court might have fixed.

The *Fields* case *supra,* suggests yet another reason for deeming the Syracuse City Charter's notice of claim provision to be preempted by State law. As the one year and ninety day statute of limitations contained in the City Charter is clearly inapplicable for the same reasons that apply to General Municipal Law Section 50-i, the Charter's notice of claim requirement must also be inapplicable.

Moreover, it is entirely reasonable to expect that the "public interest" exception discussed by this Court in *Mills,* (59 (18) N.Y.2d 307, 311, *supra*) should apply here. The public interest in preventing unconstitutional taxation is beyond dispute (See, e.g., *Hurd v. City of Buffalo,* 34 N.Y.2d 628 [1974], affg 41 A.D.2d 402 [4th Dept. 1973]; *Bethlehem Steel Corp. v. Board of Educ.,* 44 N.Y.2d 831 [1978], modfg and affg 61 A.D.2d 147 [4th Dept. 1978]; *Angelone v. City of Rochester,* 72 A.D.2d 445 [4th Dept. 1980], affd 52 N.Y.2d 984 [1981].) Plaintiff's action can

readily be viewed as one whose resolution would directly affect the rights of property owners throughout the State of New York. Syracuse's avowed policy of blatant overtaxation and of taking property by means of such overtaxation is continuing and this Court should vindicate the rights of the citizens of Syracuse (and of other cities which may follow its example) to fend off confiscatory taxation. To do otherwise would endorse a policy which immerses property owners in protracted litigation and obliges them to continue to pay admittedly illegal taxes which even large corporations like W.T. Grant and well-endowed universities like the University of Rochester are unable to pay on unrentable real estate (see *Williams v. Allen*, 616 F.Supp. 653, 658 [E.D.N.Y. 1985], *supra*).

Special Term apparently relied on *Phelps* because of its clearly mistaken conclusion that this case, like *Phelps*, involved the tort of conversion. Inasmuch as personal property (a building design) was the subject of the action in *Phelps*, the tort of (19) conversion was present. But, it is a hornbook principle of tort law that conversion applies only to personal property; real property cannot be the subject of that common law tort (23 N.Y. Jr.2d, *Conversion and Action for Recovery of Chattel*, §1, pp 207-208; Prosser, *Torts*, 4th ed. [1971], p. 81).

Since papers filed by Plaintiff in this case at the time it obtained the Preliminary Injunction in May of 1979 (164-171, 205, 229) clearly raised the constitutional questions, the rationale employed for dismissing the complaint in the *Alaxanian* case is inapplicable here. (*See* Point II (B), immediately following.)

B. Assuming, Arguendo, that a Notice of Claim was Required, the Facts Indicate *De Facto* Compliance Therewith.

On May 4, 1979, twenty-five days after the April 2, 1979 Tax Deed, the City of Syracuse was served for the Preliminary Injunction restraining the City from transfer-

ring the Property to third parties. Paragraph "11" of the affidavit of Plaintiff's then attorney, submitted in support thereof, placed the City on notice of its constitutional claims:

> The City's constant return to the 1964 assessment of $1,135,700 amounts to confiscation of plaintiff's property and unconstitutional taxation. . . . (205)

The balance of that affidavit, and the affidavit of Malcolm A. Sutton, also submitted in support of the motion, plainly and

APPENDIX D—Summons and Complaint.

STATE OF NEW YORK, SUPREME COURT,

COUNTY OF ONONDAGA.

423 SOUTH SALINA STREET, INC.,

Plaintiff,

against

THE CITY OF SYRACUSE, A Municipal Corporation, and the METROPOLITAN DEVELOPMENT FOUNDATION OF CENTRAL NEW YORK, INC., a Not for Profit Corporation, and AMLEA (NEW YORK) INC., a Business Corporation,

Defendants.

Index No. 84-633

To the above named Defendant:

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney(s) within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is

complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, February 28, 1984

MOUSAW, VIGDOR, REEVES,
HEILBRONNER & KROLL
James S. Grossman, Esq. of Counsel
Attorney(s) for Plaintiff
Office and Post Office Address
600 First Federal Plaza
Rochester, New York 14614
(716) 325-2500

Complaint

STATE OF NEW YORK, SUPREME COURT,

COUNTY OF ONONDAGA.

423 SOUTH SALINA STREET, INC.,

Plaintiff,

vs.

THE CITY OF SYRACUSE, a Municipal Corporation, THE METROPOLITAN DEVELOPMENT FOUNDATION OF CENTRAL NEW YORK, INC., a Not-For-Profit Corporation and AMLEA (NEW YORK), INC., a Business Corporation,

Defendants.

Index No. 84-633

Plaintiff, by its attorneys Mousaw, Vigdor, Reeves, Heilbronner & Kroll, for its Complaint, alleges as follows:

PRELIMINARY STATEMENT

1. This is an action for monetary damages against the above-named defendants to redress violations of rights secured to plaintiff by 42 United States Code (U.S.C.) Section 1983, Section 1985 and Section 1986 and by the Con-

stitution of the United States, and by the Constitution of the State of New York and for ancillary equitable relief. Plaintiff is the equitable owner of certain real property (hereinafter the "Property") located in the City of Syracuse, County of Onondaga, State of New York. Plaintiff seeks damages against defendant the City of Syracuse for the unconstitutional actions detailed below, and an Order vacating the deed of the Property to the City of Syracuse, the deed from the City of Syracuse to the Metropolitan Development Foundation of Central New York, Inc., and the deed from the Metropolitan Development Foundation of Central New York, Inc. to Amlea (New York) Inc.

THE PARTIES

2. Plaintiff was at all relevant times hereafter mentioned, a corporation duly organized and existing under the laws of the State of New York with its principal place of business in Syracuse, New York. On or about September 24, 1980, the corporation was dissolved and brings this action with the authority granted pursuant to Section 1006(a)(4) of the Business Corporation Law of the State of New York.

3. Defendant City of Syracuse (hereinafter the "City") is a municipal corporation organized and existing under the laws of the State of New York.

4. Upon information and belief, Defendant Metropolitan Development Foundation of Central New York, Inc. (hereafter the "Foundation") is a not for profit corporation organized under the laws of the State of New York with a place of business at the State Tower Building, Syracuse, New York.

5. Upon information and belief, Defendant Amlea (New York) Inc. (hereinafter "Amlea") is a business corporation organized under the laws of the State of New York with a place of business in Syracuse, New York.

THE PROPERTY

6. The Property is located in the City of Syracuse, County of Onondaga, in Block Number 116 of the County of Onondaga Clerk's Index of Blocks, and is commonly referred to as 425-427 South Salina Street.

7. From December of 1944 until September of 1976, the Property was owned by the University of Rochester. On or about September 26, 1976, the Property was purchased by plaintiff herein. From 1944 through January, 1976, W.T. Grant Company (hereinafter referred to as "Grants") was the sole tenant and occupant of the Property. The Property was and is commercial property.

CLAIMS

8. Beginning in 1964 through 1980 plaintiff and Grants, its predecessor in interest, commenced tax assessment proceedings for the tax years 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979 and 1980 against the Commissioner of Assessment of the City, defendant Srogi herein, seeking review and correction on the merits of the Tax Commission's final assessed valuation of the Property on the grounds of over-valuation and inequality. When utilizing the appropriate equalization rates, the assessed values of $1,135,700 (1964-1978) and $1,054,450 (1979-1980) indicate that the City considered the full value of the Property to range between $2,271,400 to $3,905,370.

9. On December 14, 1972, Grants recovered a judgment (hereinafter referred to as the "1972 Judgment") on its assessment proceedings against the City for $276,400.19 resulting from over-assessments for the years 1964 through 1970 (hereinafter the "1964 through 1970 Proceedings"). The assessment reductions and tax refunds ordered by the trial court are set forth in Paragraphs 54 and 56 hereof.

10. The City refused to pay the 1972 Judgment mentioned in Paragraph 9 herein. Rather, on December 14, 1972, the City filed a Notice of Appeal, to the New York Supreme Court, Appellate Division, Fourth Department (hereinafter referred to as the "Appellate Division"), thus obtaining a statutory stay under New York Civil Practice Law and Rules 5519(a). This Appeal is hereinafter referred to as the "1972 Appeal."

11. Pending the 1972 Appeal, the City continued to assess the Property as $1,135,700 (hereinafter the "Unlawful Assessment"), despite the 1972 Judgment.

12. Pending the 1972 Appeal, Grants encountered severe financial difficulties nationally and was sorely in need of funds. In 1975, Grants filed a petition under Chapter 11 of the United States Bankruptcy Laws.

13. In March of 1975, pending a motion by the taxpayer to dismiss the 1972 Appeal for failure to prosecute, the City offered to refund overpayments, but only on the following terms:

A. The City would refund the amount of $240,000 of the $276,400.19 1972 Judgment at the rate of $80,000 per year, but only if Grants remained open for business at this location in 1975, 1976 and 1977.

B. The City would refund or credit to future taxes, any over-payments for the years 1971 through 1975 if the New York courts were ultimately to find the Property over-assessed, but only if the courts determined that the taxpayer had over-paid by more than $120,000.00, and then only in the amount by which the courts determined that the overpayment, multiplied by two, exceeded $240,000.00.

C. The City agreed to review the assessment of the Property prior to September 1, 1975.

14. Grants, at that point desperate for funds, agreed to the terms offered by the City and recited in Paragraph 13 hereof and the City's 1972 Appeal was terminated. A copy of this Settlement Agreement is attached hereto and made a part hereof as Exhibit A.

15. The City paid $80,000 to Grants in 1975. No further payment, either under the $276,400.19 1972 Judgment or the $240,000.00 Settlement Agreement have been made. Because of continuing financial difficulties, Grants was forced to close its store on the Property in January, 1976.

16. Despite the 1972 Judgment, and despite the obligation to reassess the Property set forth in Paragraph 12(c) hereof, the Unlawful Assessment for the Property was not changed, and continued at $1,135,700 for tax years 1976, 1977 and 1978.

17. On September 26, 1976, Plaintiff herein purchased the Property from the fee holder, the University of Rochester, and took title subject to the outstanding taxes for the first two (2) quarters of the tax year 1976. The deed to plaintiff is recorded in the Onondaga County Clerk's Of-

fice, at Liber 2598 of Deeds at page 326 & c. At the time, while taxes for all prior years had been paid, (despite the City's refusal to pay refunds), the University of Rochester had not paid the taxes for the first two quarters of 1976.

18. The assessment proceedings for tax years 1971 through 1976 (hereinafter the "1971 through 1976 Proceedings") were tried before the Honorable Justice Henry A. Hudson (J.S.C.), on or about May 3, 1976. At that time, by Assignment of the Appellate Division, attached hereto and made a part hereof as Exhibit B, Justice Hudson was the sole judge appointed to hear tax certiorari matters in Onondaga County.

19. Justice Hudson retired from the bench on or about December 31, 1977. At that time, no decision on *any* tax assessment proceeding heard during Justice Hudson's term, including the 1971 through 1976 Proceedings, had been issued.

20. In February, 1978, plaintiff moved to have the 1971 through 1976 Proceedings retried on the basis that Justice Hudson had retired without issuing a decision. At that time, plaintiff was advised to withdraw its motion and that a decision was forthcoming on the 1971 through 1976 Proceedings.

21. In late February, 1978, the decision of Justice Hudson, dated December 30, 1977, was issued. This decision encompassed not only the 1971 through 1976 Proceedings, but other unrelated proceedings as well. In his decision, Justice Hudson explained the delay in reaching a decision on all of these cases as follows:

> "The difficulties which were encountered in completing the negotiations toward settlement ex-

tended over a year and were, in the Court's opinion, not justified. They arose primarily because the officials of the respondent [the City] would not proceed diligently in acting upon proposals which were recommended by their counsel and which the Court was led to believe would be promptly processed and acted upon. The Property owners in many of the cases and particularly those involving the retail store properties indicated their willingness to cooperate with the Court upon the basis which would provide treatment substantially equal with that already reached with other Property owners in the same general category.

Upon the completion of the settlement of the S.A. & K. Building and Empire Building cases, a number of problems arose which made it obvious that the respondent would not be in a position to proceed with the remaining cases assigned to the Court. These included the resignation of the Corporation Counsel and his replacement with one with no prior knowledge of the litigation; the appointment of the Special Corporation Counsel who had handled all of the respondent's certiorari litigation for the previous four or five years to be a judge of the Court of Claims; the failure of the respondent to obtain a successor; the release of the respondent's appraiser from further service as such; the inability of respondent to find a replacement; and the continued failure of the new Corporation Counsel and the Mayor, who had taken over the settlement negotiations, to cooperate with the Court in completing those negotiations which had appeared to be on the verge of settlement. The Court in December 1976 advised counsel that he would not try any further cases as he intended to retire December 31, 1977, and had received his reg-

ular assignments for 1977. The Court continued throughout 1977 to urge the respondent to reach a decision on all of the cases which had been tried, at least two of which the Court had been assured had been tentatively approved. A decision in all of the cases was purposely withheld as it was felt the pending negotiations might well be prejudiced thereby." (See Exhibit D attached hereto).

22. On April 21, 1978, Justice Richard Aronson (J.S.C.), who succeeded Justice Hudson as the sole judge for tax assessment proceedings in Onondaga County, issued an Order based upon the opinion of the Justice Hudson, dated December 30, 1977, directing that the taxpayer recover a judgment on the 1971 through 1976 Proceedings (hereinafter the "1977 Judgment") in the amount of $239,695.68 plus interest and costs, for a total of $247,461.68 against the City for back taxes resulting from overassessments. A copy of this Order, and the portion of opinion of Justice Hudson, are together attached hereto and made a part hereof as Exhibit C.

23. The reductions in full market value, assessed value, and the proper tax, as reflected in the 1977 Judgment for tax years 1971 through 1976, are as follows:

	Full Market Value		**Assessed Value**	
Year	**City**	**Court**	**City**	**Court**
1971	$2,523,778	$1,820,000	$1,135,700	$823,500
1972	2,523,778	1,830,000	1,135,700	823,500
1973	2,641,163	1,670,000	1,135,700	718,100
1974	2,641,163	1,670,000	1,135,700	718,100
1975	2,839,250	1,510,000	1,135,700	604,000
1976	2,839,250	1,510,000	1,135,700	604,000

Year	Tax Assessed City	Court
1971	$119,373.43	$86,558.09
1972	122,939.53	89,143.88
1973	116,908.96	73,921.21
1974	113,183.86	71,565.85
1975	122,462.53	65,129.32
1976	128,504.46	68,342.60

24. The City did not satisfy the 1977 Judgment described in paragraphs 22 and 23 hereof, but on May 4, 1978 the City filed a Notice of Appeal to the Appellate Division thereby obtaining a statutory stay under New York Civil Practice Law and Rules 5519(a) of enforcement of the 1977 Judgment. This Appeal is hereinafter referred to as the "1978 Appeal."

25. In April of 1979, the plaintiff moved the Appellate Division to dismiss the 1977 Appeal and the Appellate Division Ordered the City to perfect the 1977 Appeal by June 1, 1979. Rather than having the 1977 Appeal dismissed, the City, under compulsion of the Appellate Division Order, filed the necessary papers by the required date.

26. On or about May 1, 1979, prior to perfection of the 1977 Appeal, the then counsel for plaintiff was informed that the City had taken a tax deed (hereinafter referred to as the "City Deed") for the Property for non-payment of the 1976 taxes. The City Deed was recorded in the Onondaga County Clerk's office on April 9, 1979 in Liber 2708 of Deeds at Page 64 &c. A copy of the City Deed is attached hereto and made a part hereof as Exhibit D.

27. According to the recitations contained in the City Deed, the City purportedly conducted a "tax sale" on April 6, 1977 at which the City was the highest bidder.

The City's "bid" was the amount of unpaid 1976 taxes, plus interest, or $139,058.21. The City claims this bid to be the highest bid received (*see* Exhibit D) on Property determined by the City to have a full market value in 1977 of approximately $3,289,024.00.

28. By Order of Justice Aronson (J.S.C.), entered May 17, 1979, the City was enjoined from transferring title to the Property to any third party pending final determination of the 1971 through 1976 Proceedings, as well as assessment proceedings instituted for 1977 through 1979. A copy of this Order (hereinafter referred to as the "Preliminary Injunction") is attached hereto and made a part hereof as Exhibit E.

29. On May 18, 1979, the City filed a Notice of Appeal from the Preliminary Injunction to the Appellate Division.

30. By unanimous decision on the 1977 Appeal, dated December 14, 1979, the Appellate Division (the Hon. Richard D. Simons, J.), further reduced the assessments on the Property by nearly half again the reduction of the 1977 Judgment, resulting in the total refunds due of $353,734.81, plus interest and costs, for the 1971 through 1976 Proceedings. Further, at the same time and by the same decision, the Appellate Division affirmed the Preliminary Injunction. A copy of those Orders and this decision are together attached hereto and made a part hereof as Exhibit F.

31. Again refusing to satisfy the 1977 Judgment, as modified by the Appellate Division, by Notices of Appeal dated February 26, 1980 and April 3, 1980, the City appealed (hereinafter referred to as the "Final Appeals") the Orders of the Appellate Division further reducing the as-

sessments and affirming the Preliminary Injunction to the New York Court of Appeals. Again, by appeal, the judgment to refund taxes was stayed. After plaintiff's counsel served a twenty (20) day demand in October of 1980 pursuant to the Rules of the Court of Appeals, the City finally served the required papers on or about November 5, 1980, and its appeals were perfected.

32. By decision dated April 9, 1981, the Court of Appeals affirmed the Order of the Appellate Division reducing the assessments, and judgment for the 1971 through 1976 proceedings was finally entered in the amount of $353,734.81, plus interest and costs. This judgment is hereinafter referred to as the "Final Judgment." By the same decision, while confirming the pattern of conduct of the City and its officials as detailed by the Appellate Division, the Court of Appeals reversed the Appellate Division's affirmance of the Preliminary Injunction on other grounds. A copy of this decision is attached hereto and made a part hereof as Exhibit G.

33. The City paid the Final Judgment to the Bankruptcy trustee charged with administering the estate of W. T. Grant Company under the United States Bankruptcy Code.

34. Pursuant to Paragraph 2 of the Settlement Agreement attached hereto as Exhibit A, and the provisions therein for adjusting the Final Judgment, the amount due to the taxpayer for refunds of taxes finally determined on the 1971 through 1976 Proceedings is $471,832.76, an amount equal to $118,097.95 more than the Final Judgment.

35. The City has refused to pay the amount due under the Settlement Agreement, and upon information and be-

lief, despite the benefits reaped by the City for tax years 1969 through 1970 under the Settlement Agreement, the City now claims that that Settlement Agreement does not bind the City as to tax years 1971 through 1976.

36. The tax assessed by the City for tax year 1976 alone claimed was $128,504.46. As reduced by the Appellate Division and affirmed by the Court of Appeals, the total tax due for tax year 1976 alone is only $42,997.00.

37. The Property taken by the City was thus taken for non-payment of taxes finally determined to be only $42,997.00, while the refund due pursuant to the Settlement Agreement, which the City now refuses to honor, equals $471,832.76.

38. Tax assessment proceedings were instituted on behalf of plaintiff for the years 1977, 1978, 1979 and 1980. However, without legal title to the Property, plaintiff did not have the financial ability to finance the continuation of such proceedings. These proceedings were accordingly dismissed in 1981 for failure to prosecute.

39. All of the assessment proceedings, including but not limited to that for tax year 1976, have been deliberately and successfully delayed by defendants by means including, but not limited to, the following wrongful patterns of conduct and practices:

a. The City has continuously insisted that one appraiser only and one attorney only must represent it in all assessment cases, despite the large number of such cases filed each year.

b. The City has assured trial courts that it would act upon its own counsel's recommendations with due

speed. The City has, however, been uncooperative in acting on its counsel's recommendations and has thereby delayed decisions by these courts.

c. The City has delayed each and every appeal in the tax assessment proceedings until ordered or required to perfect such appeal upon penalty of dismissal. (*See* Exhibits C, F and G).

40. Despite court rulings, the Settlement Agreement, and promises to review the assessments, the City has continuously restored the Unlawful Assessment of $1,135,700 on the Property each and every year from 1964 through 1978. Such assessement was minimally reduced to $1,054,450 for tax years 1979 and 1980. These assessments are substantially in excess of every assessment determined to be lawful by the courts of the State of New York. The taxpayer has thus been given the choice between perpetual assessment proceedings with attendant appeals or payment of a tax which the courts have repeatedly held to be two to four (2-4) times the lawful tax.

41. By New York State law, unless modified by local law, a taxpayer is required to pay the full amount taxed, no matter how great, even though assessment review proceedings have been instituted. With respect to the periods in question here, if a refund was found due, the City was required to pay only three percent (3%) interest to the taxpayer on unlawfully collected taxes.

42. The City has no law or practice authorizing partial payment of assessed taxes pending assessment review proceedings. Thus the only way to prevent taking of the Property for non-payment of taxes would have been to pay to the City the unlawfully assessed tax of $128,504.40 for 1976, the unlawful assessed tax of $138,600.82 for 1977,

the unlawful assessed tax of $143,739.19 for 1978, the unlawfully assessed tax of $126,976.87 for 1979 and the unlawfully assessed tax of $133,324.65 for 1980, with hope of an eventual refund many years in the future.

43. Pending the Final Appeals to the Court of Appeals, and after plaintiff learned that the City had, contrary to its policy, taken a tax deed (*see* paragraph 26 hereof), and prior to the expiration of the redemption period, plaintiff, by its counsel, offered to pay the taxes determined by the Appellate Division for 1976 (and subsequently affirmed by the Court of Appeals) to redeem the Property from the tax sale. In addition, plaintiff offered to pay taxes for the years 1977, 1978, 1979 and 1980, as determined in a like manner. The City, by defendant Alexander, refused to accept such proposals.

44. In 1975, the annual income from the Property, including rent charged under the Lease of the entire Property, was only $80,000. In an attempt to retain the sole tenant (Grants), that amount was reduced to only $40,000 a year. Prior to the closing of Grants, the amount assessed by defendants in real property taxes alone thus equaled more than *three* (3) times the annual income from the Property.

45. Customarily, commercial tenants pay all or a substantial portion of real property taxes. Following the closing of Grants, plaintiff extensively offered the Property for sale or lease. However, all potential lessees and purchasers ultimately refused to rent or buy because of the onerous and unlawfully excessive taxes.

46. Since the City took title to the Property it has rented or leased a portion of the Property to Onondaga Savings Bank. Upon information belief, the City has been

able to so rent the Property because it has not been required to pay deliberately excessive real Property taxes.

47. Resolution of the 1964 assessment proceeding took 11 years, even without final appeals. Similarly, refunds for 1971 were not paid until 1981. The 1976 assessment proceeding was not finally resolved until 1981. The 1977 through 1980 proceedings have been mooted and may thus never be resolved.

48. Despite substantial efforts, plaintiff was unable to obtain the necessary money for excessive tax payments, on the basis that such sums would be recovered at only 3% interest years hence after extensive litigation and appeals.

49. The taxes assessed, as compared to the taxes found due by the courts of New York, for tax years 1964 through 1980, are approximately as follows:

	Tax Assessed	
Year	**City**	**Court**
1964	$ 85,472.78	$ 55,842.92*
1965	90,606.15	59,196.78*
1966	93,104.69	67,633.50*
1967	97,931.41	63,982.66*
1968	103,655.34	60,375.11*
1969	113,002.15	65,819.25*
1970	107,846.07	60,024.22**
1971	119,373.43	56,759.40**
1972	122,939.53	58,455.00**
1973	116,908.96	42,050.99**
1974	113,183.86	40,711.11**
1975	122,462.53	40,975.40**
1976	128,504.46	42,997.00**
1977	138,600.83	

	1978	143,734.19	
	1979	126,976.87	
	1980	133,324.65	
Total:	1964-1976	$1,414,991.36	$714,823.36
	1971-1976	723,372.77	281,948.90
	1964-1980	1,957,627.90	855,544.56***

*as reduced by trial court
** as reduced by Appellate Division
***assuming 1976 assessment for 1977-80

50. The defendants have engaged in a continuous and consistent pattern and practice of overassessment of many properties in downtown Syracuse, and upon information and belief, have engaged in such practice in part so as to raise funds without violating the letter of the New York Constitutional debt limit. Even if the City finally paid a tax refund, as a result of these overassessments, it would have had the use of the overpayments for years at the rate of 3% interest per annum. The City thus "borrowed" from the taxpayer in excess of its debt limitation at an interest rate far below that available to the City.

51. The full and assessed values, as determined by the City and its agents, together with the equalization ratios and the full and assessed values as found by the courts of New York for tax years 1964 through 1980, are approximately as follows:

Year	Full Market Value City	Full Market Value Court	Equalization Rate**	Assessed Value City	Assessed Value Court
1964	$2,523,778	$1,650,000*	45%	$1,135,700	$742,000
1965	2,523,778	1,650,000*	45	1,135,700	742,000
1966	2,271,400	1,650,000*	50	1,135,700	825,000
1967	2,523,778	1,650,000*	45	1,135,700	742,000
1968	2,523,778	1,470,000*	45	1,135,700	661,500
1969	2,523,778	1,470,000*	45	1,135,700	661,500
1970	2,641,163	1,470,000*	43	1,135,700	632,100
1971	2,523,778	1,200,000	45	1,135,700	540,000
1972	2,523,778	1,200,000	45	1,135,700	540,000
1973	2,641,163	950,000	43	1,135,700	408,500
1974	2,641,163	950,000	43	1,135,700	408,500
1975	2,839,250	950,000	40	1,135,700	380,000
1976	2,839,250	950,000	40	1,135,700	380,000
1977	3,289,024		34.04	1,135,700	
1978	3,719,948		30.53	1,135,700	
1979	3,792,986		27.80	1,054,450	
1980	3,905,370		27	1,054,450	

*By decision of the trial court, pending appeal, prior to Settlement between the parties.

**Equalization Rates 1968-1976—as determined by Appellate Division: 1977-80—as established by the State Board of Equalization and Assessment.

52. Upon information and belief, the City is served with approximately 150 assessment reduction proceedings each year. Nearly all of these proceedings involve downtown commercial properties which the courts of New York have determined previously, on one or more occasions, to be substantially and unlawfully over-assessed.

53. Upon information and belief, it is highly unusual for the City to take title to downtown Syracuse properties by tax deed unless the City has a predetermined use for

such property. The plaintiff's Property was in this instance singled out for taking by defendants.

54. In or about December, 1981, upon application by the City, the United States government awarded the City $7.5 million Urban Development Action Grant ("UDAG") for construction of a shopping mall and office complex (hereinafter the "Syracuse Market Center").

55. The UDAG grant and the Syracuse Market Center were first made public during the latter part of December, 1981. A newspaper article announcing the same, published on December 23, 1981 is attached hereto and made a part hereof as Exhibit H. This information was not before any court on the assessment proceedings or appeals mentioned above.

56. The Syracuse Market Center includes the Property, and, upon information and belief, the Property is the key parcel to the Syracuse Market Center.

57. By its unlawful and intentional overreaching conduct, not only has the City acquired a valuable parcel of property on the basis of unpaid overstated 1976 taxes, ($128,504.46), it has also turned a cash profit in excess of these 1976 taxes, amounting to more than three (3) times the taxes found due by the Court of Appeals for 1976 by the Final Judgment ($42,997.00). Essentially, the benefit to the City, and the loss to the plaintiff and its predecessors resulting from defendants' conduct from 1964 through 1980, is as follows:

Total paid by taxpayer—1964-1976		$1,286,486.90
Less refunds paid		
per Final Judgment	$353,728.00	-435,916.38
per Settlement	80,000.00	
Net paid by taxpayer		$852,758.90
Less amounts lawfully Assessed, as judicially determined		-714,823.34
Net amount, above lawful taxes, retained by City		$137,935.56
Plus title to property as valued in 1979 by		
City at	3,792,986.00	
Courts at	950,000.00	
Total benefit to City		$3,930,921.56 (maximum)
		1,087,935.56 (minimum)

58. On April 2, 1982, plaintiff herein commenced an action in the United States District Court, Northern District of New York (Civil Action No. 82 CV 319) against defendant herein and against certain individual defendants. The action referred to in this paragraph is hereinafter referred to as the "Federal Action."

59. The Federal Action set forth claims for relief identical to the claims set forth herein.

60. On May 6, 1983 judgment was entered in the Federal Action dismissing the Complaint. A copy of the Memorandum Decision and Order by the Hon. Howard G.

Munson upon which judgment was entered is attached hereto and made a part hereof as Exhibit "I".

61. By Notice of Appeal filed May 23, 1983, plaintiff appealed the judgment and Order referred to in Paragraph 59 hereof to the United States Court of Appeals for the Second Circuit.

62. By deed dated November 22, 1983 and recorded on November 30, 1983 at Liber 3053 of Deeds, page 217 in the Onondaga County Clerk's Office, the City attempted to convey title to the Property to defendant Foundation. This deed is hereinafter referred to as the "Foundation Deed."

63. The Foundation took title to the property upon actual or constructive notice of plaintiff's claims to title of the Property and the pendency of the Federal Action.

64. Any title conveyed by the City to the Foundation is subject to the rights of plaintiff herein.

65. By decision dated December 14, 1983, the Second Circuit Court of Appeals affirmed the judgment dismissing the Federal Action Complaint. A copy of the decision referred to in this Paragraph is attached hereto and made a part hereof as Exhibit "J".

66. The Federal Action against the City was dismissed solely on jurisdictional grounds and no judgment on the merits of the Federal Action as against the City was rendered.

67. By deed dated December 19, 1983, and recorded on February 23, 1984, at Liber 3073 of Deeds, page 17 in the Onondaga County Clerk's Office, the Foundation at-

tempted to convey title to the Property to defendant Amlea. This deed is hereinafter referred to as the "Amlea Deed."

68. Amlea took title to the Property upon actual or constructive notice of plaintiff's claims to title of the Property and the pendency of the Federal Action.

69. Any title conveyed to Amlea is subject to the rights of plaintiff herein.

70. Six months have not elapsed since the Second Circuit Court of Appeals affirmed dismissal of the Federal Action Complaint.

COUNT I

71. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 70, and 71 through 72, as though each were set forth in full herein.

72. Until April 9, 1979, the actions of the City precluded any fair use or return on the Property, virtually destroyed the value of the Property, and constitute a deprivation of plaintiff's Property without due process, without just compensation and without equal protection of the law all in violation of the Constitution of the United States and 42 U.S.C. §1983 and the Constitution of the State of New York.

COUNT II

73. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 70, as though each were set forth in full herein.

74. The taking of the Property by tax deed by the City, and the retention of the amounts received from the tax sale in excess of lawfully assessed taxes by the City, deprived plaintiff of its Property without due process, without just compensation and without equal protection of the law all in violation of the Constitution of the United States and 42 U.S.C. §1983 and the Constitution of the State of New York.

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully requests that this Court grant judgment as follows:

A. Awarding the sum of $6,000,000.00 actual damages, plus interest, punitive damages in a like amount, and special damages in an amount to be determined by this Court as against the City;

B. Vacating the Tax Deed taken by the City, the Foundation Deed taken by the Foundation and the Amlea Deed taken by Amlea, and declaring plaintiff to be the full legal owner of the Property;

C. Directing the Clerk of Onondaga County to cancel and set aside the Tax Deed, the Foundation Deed; and the Amlea Deed;

D. Awarding plaintiff its costs and disbursements, including attorneys fees, of this action;

E. For such other further, additional and different relief as to this Court may seem just and proper.

Dated: February 28, 1984.

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Supreme Court, U.S.
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MAR 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1350

In The

Supreme Court of the United States

OCTOBER TERM, 1986

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423 SOUTH SALINA STREET, INC.,

Appellant,

vs.

CITY OF SYRACUSE, METROPOLITAN DEVELOPMENT FOUNDATION OF CENTRAL NEW YORK, INC., AND AMLEA (NEW YORK), INC.,

Appellees.

REPLY TO MOTION TO DISMISS

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March 23, 1987

Daily Record Corporation
Rochester, New York

(13405)

REPLY TO MOTION TO DISMISS OR AFFIRM

The City of Syracuse's Motion to Dismiss or Affirm simply repeats all of the arguments which New York's court of last resort rejected in its Opinion. The Court of Appeals found that the Complaint stated a Cause of Action and that the action was commenced within the applicable Statute of Limitations. The City's reiteration of rejected arguments should not be permitted to obfuscate the sole remaining issue before this Court — an issue which the Court of Appeals observed this Court has "yet to consider" (see Jurisdictional Statement, p. A-19) — whether the application of New York's General Municipal Law §50-i to a federal civil rights claim violates the Supremacy Clause of the Constitution. This Court clearly has jurisdiction of that issue pursuant to 28 USC §1257(2). This argument was raised consistently below (see, for example, Point II of Appellant's Reply Brief below, which is found on p. 2c of Appellee's Appendix C).

While Appellant never argues that New York General Municipal Law, §50-i, is constitutionally invalid on its face, it has steadily argued that it would be unconstitutional if applied to a federal civil rights claim. The conflict among the lower federal courts and the overriding importance of this sole remaining issue, clearly warrant this Court's noting probable jurisdiction or treatment of the Jurisdictional Statement as a Petition for Certiorari and granting the Petition.

Respectfully Submitted,

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